No.

In The Supreme Court of the United States

KEITH KEGLEY and KIMBER KEGLEY,
CECIL HAMMONDS and MAGGIE HAMMONDS,
and CHADWICK J. MCKEOWN,

Petitioners,

v.

CITY OF FAYETTEVILLE, a
North Carolina Municipality,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

All Petitioners in the above-captioned action respectfully petition this Honorable Court pursuant to 28 U.S.C. § 2101(c) and Rule 13 of the Rules of the Supreme Court of the United States for a Writ of Certiorari to review the North Carolina Supreme Court's decision denying Petitioners' Petition for Discretionary Review and the decision of the North Carolina Court of Appeals which Petitioners sought to have reviewed (collectively referred to as the "State Court decisions"), and show the Court as follows:

QUESTION PRESENTED

Whether the automatic tolling provision of Servicemembers' Civil Relief Act Section 206(a) (50 App. U.S.C. § 526(a)) applies to the 60-day limitation period established by N.C. Gen. Stat. § 160A-50(a) for challenges to involuntary annexation ordinances adopted by local governments?

PARTIES

The Petitioners are five individuals – Keith Kegley and his wife, Kimber Kegley, Cecil Hammonds and his wife, Maggie Hammonds, and Chadwick J. McKeown. Petitioners Keith Kegley, Cecil Hammonds, Maggie Hammonds and Chadwick J. McKeown were at all times relevant to this Petition active duty members of the United States Army stationed at Fort Bragg, North Carolina, and owners of residential property in the Annexation Area.

The Respondent, the City of Fayetteville, is a North Carolina municipality having such power and authority as is granted to it by the General Assembly of the State of North Carolina, including the power to involuntarily annex territory pursuant to Part 3, Article 4A of North Carolina General Statutes, Chapter 160A.

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Keith Kegley et al v. City of Fayetteville, North Carolina, United States Supreme Court Application No. 05A281 (September 28, 2005) Order Denying Petitioners' Application for Stay Pending Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

The Order of the North Carolina Supreme Court denying Petitioners' Petition for Discretionary Review of the North Carolina Court of Appeals' decision was entered on August 19, 2005. (App. p. 17a).[1] According to N.C. Gen. Stat. § 160A-50(i), the denial of a petition for discretionary review constitutes the "final judgment" in an annexation challenge.

Pursuant to 28 U.S.C. § 1257(a), final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court by Writ of Certiorari, where, *inter alia,* a statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the laws of the United States. Here, North Carolina State Courts refused to apply the automatic tolling provision of Section 206(a) of the Servicemembers' Civil Relief Act to the 60-day limitation period established by N.C. Gen. Stat. § 160A-50(a).

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[1] Such references are to the Appendix to this Petition required by Rule 13(1)(i) of the Rules of the Supreme Court of the United States.

Pursuant to 28 U.S.C. § 2101(c), a Petition for Writ of Certiorari shall be taken or applied for within ninety (90) days after the entry of judgment or decree with respect to which this Honorable Court's review is requested. That ninety (90) day period expires on November 17, 2005. Therefore, this Petition is timely.

STATUTES INVOLVED IN THE CASE

Section 206(a) of the Servicemembers' Civil Relief Act (50 App. U.S.C.S. § 526(a)) (App. p. 42a) reads as follows:

Sec. 206 Statute of Limitations

> (a) TOLLING OF STATUTES OF LIMITATIONS DURING MILITARY SERVICE – The period of a servicemember's military service may not be included in computing any period limited by law, regulation or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department or other agency of the State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators or assigns.

N.C. Gen. Stat. § 160A-50(a) (App. p. 43a) reads as follows:

Section 160A-50. Appeal.

> (a) Within 60 days following the passage of an annexation ordinance under

> authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedures set forth in this Part or to meet the requirements set forth in N.C. Gen. Stat. § 160A-48 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

STATEMENT OF THE CASE

Procedural History

On June 14, 2004, Petitioners Keith Kegley and Kimber Kegley filed a Petition For Review of Annexation Ordinance challenging the involuntary Annexation Ordinance adopted by Respondent on November 24, 2003 (the "Adoption Date") pursuant to North Carolina's involuntary annexation statutes (N.C. Gen. Stat. § 160A-45 *et. seq.*). On June 17, 2004, all Petitioners filed an Amended Petition. Respondent immediately moved to dismiss the Petition and Amended Petition (hereinafter the "Petitions") as untimely because they were filed more than 60 days after the Adoption Date. The Petitions alleged that Petitioners were in active military service and therefore the Petitions were timely because Section 206(a) of the Servicemembers Civil Relief Act (50 App. U.S.C. § 526, as amended by Pub. L. 108-109, Sec. 1, [206]. Dec. 19, 2003, 117 Stat. 2844) tolled the 60-day limitations period for challenging involuntary annexation ordinances established by N.C. Gen. Stat. § 160A-50(a).

On June 28, 2004, Respondent's pre-answer motion to dismiss the Petitions was granted. (App. p. 36a). Petitioners immediately filed a Notice of Appeal. Petitioners and Respondent made various applications to the North Carolina Court of Appeals and North Carolina Supreme Court, the disposition of which are reflected in the various Orders contained in the Appendix to this Petition.

The North Carolina Supreme Court stayed Judge Locklear's Order to the extent that Judge Locklear denied a stay of the Annexation Ordinance's effective date in accordance with N.C. Gen. Stat. § 160A-50(i) (App. p. 46a) until a final judgment was entered. According to that statute, the denial of a petition for discretionary review constitutes a "final judgment."

By Order filed on June 7, 2005 (App. p. 1a), the North Carolina Court of Appeals unanimously affirmed the Order Granting Respondent's Motion to Dismiss. On July 6, 2005, Petitioners filed a Petition for Discretionary Review pursuant to N.C. Gen. Stat. § 7A-31(c) with the North Carolina Supreme Court.

On August 18, 2005, the North Carolina Supreme Court denied Petitioners' Petition for Discretionary Review of the North Carolina Court of Appeals' determination (App. p. 17a). Petitioners sought a stay of the effective date of the Annexation Ordinance from the North Carolina Supreme Court and then from this Honorable Court, but the applications were denied on September 13, 2005 (App. p. 13a) and September 28, 2005 (App. p. 10a), respectively. As a result, the Annexation Ordinance became effective on September 30, 2005.

Petitioners now seek review of the State Court decisions by the United States Supreme Court via Petition for Writ of Certiorari because the State Court decisions are

at odds with prior decisions of this Honorable Court, of the Fourth Circuit Court of Appeals, and of other State Courts of last resort. According to Rule 13(1) of the Rules of Supreme Court of the United States, a petition for writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely filed when it is filed with the Clerk of the United States Supreme Court within 90 days after entry of the order denying discretionary review. In this case, the 90-day period expires on November 17, 2005.

Factual Background

On November 24, 2003, the City of Fayetteville City Council (hereinafter "Respondent" or the "City"), adopted an Annexation Ordinance involuntarily annexing approximately 28 square miles of territory (the "Annexation Area") into its corporate limits, effective June 30, 2004. The Annexation Area consists of essentially the entire unincorporated territory of Cumberland County lying between the Hoke County line and the City's western boundary, south of Fort Bragg. About 43,000 people reside in the Annexation Area, including thousands of military personnel and/or their families – mostly U.S. Army personnel stationed at Fort Bragg, North Carolina, like Petitioners.

Each Petitioner, except Kimber Kegley, is in active military service and was deployed overseas in either Afghanistan or Iraq, or both, for part of the period between November 24, 2003 and the time the Petitions were filed in June 2004. Several of the Petitioners returned from their most recent overseas assignments in mid-April 2004, well after the 60-day limitation period had expired.

On June 14, 2004, Mr. and Mrs. Kegley filed a Petition for Review of Annexation Ordinance challenging the Annexation Ordinance. On June 17, 2004, Petitioners filed an Amended Petition, which added Cecil Hammonds, Maggie Hammonds_ and Chadwick J. McKeown as Petitioners. The City immediately moved to dismiss the Petitions pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure because the Petitions had not been filed within sixty (60) days of the Adoption Date as required by N.C. Gen. Stat. § 160A-50(a). Petitioners opposed the City's motion.

Cumberland County Superior Court Hon. Gary A. Locklear granted the City's Motion because the Petitions had not been filed within sixty (60) days of the Adoption Date. Judge Locklear recognized in his Order that "a literal reading of Section 206 would appear to make it applicable to Petitioners under N.C. Gen. Stat. § 160A-50," but then said that "the statute can reasonably be construed not to so apply." (App. p. 39a). Though the Petitions specifically alleged (i) that Petitioners were active duty military members of the United States Army and (ii) that § 206(a) of the Servicemembers' Civil Relief Act tolled the 60-day limitation period established by N.C. Gen. Stat. § 160A-50(a) (App. p. 38a), Judge Locklear ruled that the Act did not apply. (App. p. 40a).

Petitioners appealed that decision to the North Carolina Court of Appeals, which unanimously affirmed the decision on June 7, 2005. (App. p. 1a-9a). Based on this Court's decisions in *Gregory v. Ashcroft*, 501 U.S. 452, 460-461, 115 L. Ed. 2d 410, 424 (1991) (the "plain statement rule is. . . an acknowledgement that the states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere") (App. p. 4a) and *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140, 158 L. Ed. 2d 291, 305 (2004) ("federal legislation threatening

to trench on States' arrangements for conducting their own governments should be treated with great skepticism.") (App. p. 5a), North Carolina's Court of Appeals determined the broad tolling provision of Servicemembers Civil Relief Act § 206(a) did not apply to involuntary annexation challenges. The North Carolina Court of Appeals rejected Petitioners' argument that this Court's decision in *Conroy v. Aniskoff*, 507 U.S. 511 (1993) and various Fourth Circuit Court of Appeals' decisions (discussed *infra*) dictated that § 206(a)'s automatic tolling provision applied to all proceedings, including this annexation challenge. Petitioners sought discretionary review by the North Carolina Supreme Court, but their Petition for Discretionary Review was denied on August 18, 2005. (App. p. 17a).

ARGUMENT

I. SERVICEMEMBERS CIVIL RELIEF ACT SECTION 206(a), BY ITS CLEAR LANGUAGE, TOLLED THE 60-DAY LIMITATION PERIOD.

Section 206 of the Servicemembers' Civil Relief Act (hereinafter the "Act") (App. p. 42a) provides that "The period of a servicemember's military service may not be included in computing any period limited by law. . . for the bringing of any. . . proceeding in a court, of a State (or political subdivision of a State). . ." 50 App. U.S.C. § 526; as amended by Pub. L. 108-119, Sec. 1, [206], Dec. 19, 2003, 117 Stat. 2844). The Act is the present-day version of post-Civil War legislation era. Prior to 2003, the Act was known as the Soldiers' and Sailors' Civil Relief Act of 1940. That Act was amended on several occasions since 1940, see *Conroy v. Aniskoff*, 507 U.S. 511, 520-522 (Scalia, J., dissenting) (discussion of legislative history of what is now § 206(a) of the Act), and was comprehensively overhauled, restated, clarified and revised in December 2003.

Section 206(a)'s tolling provision has been in the Act in one form or another, but substantially unchanged, since at least 1918. (*Id.*). Its clear and unambiguous language applies in this situation. Section 206(a) provides that the limitation period for bringing any proceeding in any court does not include "the period of a servicemember's military service," defined in Section 101 of the Act as "the period beginning on the date on which a servicemember enters military service and ending on the date on which the servicemember is released from military service or dies while in military service." 50 App. U.S.C. § 511(3).

That the Act was intended by Congress to apply is made crystal clear by Section 2 of the Act, which establishes as the primary purpose of the Act "to provide for, strengthen and expedite the national defense through protection extended by this Act to servicemembers of the United States *to enable such persons to devote their entire energy to the defense needs of the Nation.*" 50 App. U.S.C. § 511(3). Thus, the express language of the Act – as suggested by the title of Section 206 – supports Petitioners' contention that the 60-day limitation period established by N.C. Gen. Stat. § 160A-50(a) was tolled for Petitioners. The Act states unequivocally the strong public policy reason for the Act – so that servicemembers may devote their energy and attention to the "defense needs of the Nation" without worrying about judicial proceedings. The plain language of Section 206(a) manifests Congress' intent that all limitations periods affecting service members are tolled during their terms of active duty. Based on this plain language, the Petitions herein were timely because the 60-day limitations period had been tolled by Section 206(a) and the State Courts committed legal error when they dismissed the Petitions. In reaching their decisions, the State Courts disregarded this Honorable Court's decision in *Conroy v. Aniskoff*, and the decisions of various federal Circuit Courts and State supreme courts addressing the very language at

issue here. Therefore, and as more fully discussed below, Petitioners submit there are compelling reasons for this Court to grant this Petition for Writ of Certiorari.

II. ORDINARY RULES OF STATUTORY CONSTRUCTION DICTATE THAT THE TOLLING PROVISION OF THE ACT APPLIES IN THIS CASE.

In the State Courts, relying on various authorities, the City argued that Section 206(a) of the Act does not apply in this case. Essentially, the City's argument boils down to this – that Congress could not possibly have intended for the Act to apply to annexation challenges. The North Carolina Court of Appeals based its decision in part on the fact that "the word 'annexation' appears nowhere in the statute." (App. p. 6a). The State Courts were persuaded by the City's argument on this point. The North Carolina Court of Appeals reasoned, based on this Court's decisions in *Gregory* and *Nixon*, among other authorities, that because Section 206(a) does not expressly refer to annexation proceedings, Congress could not have intended the tolling provision to apply to annexation challenges.[2] However, the City and the State Courts missed or misinterpreted the plain meaning of the Act and disregarded longstanding precedent on this point.

This Honorable Court considered, and Petitioners submit conclusively determined, that there is no ambiguity in the tolling provision found in the present Section 206 of the Act, in *Conroy v. Aniskoff*, 507 U.S. 511 (1993), a real property tax redemption action brought by a servicemember

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[2] On this point, Petitioners note that § 526(a) does not specifically refer to any particular type of action or proceeding, rather it refers to "any" limitation period "for the bringing of any action or proceeding in a court."

who relied on the tolling provision of former Section 205 to bring his redemption action. In *Conroy*, the Court granted certiorari to resolve a conflict in the interpretation of § 525 of the Act – whether a servicemember needed to show prejudice to his rights caused by military service to qualify for the tolling provision. The Court reviewed Section 205 (the predecessor to the language now found at Section 206) of the Act, which read as follows:

> ***The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department or other agency of government by or against any person in military service*** or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period. . . be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax or assessment. (emphasis added).

50 U.S.C. § 525 (1988 ed., Supp. III). This Court said in *Conroy* as follows:

> ***The statutory command in § 525 is unambiguous, unequivocal and unlimited.*** *It states that the period of military service "shall not be included" in the computation of "any period*

> *now or hereafter provided by any law for the redemption of real property. . ."*

Conroy v. Aniskoff, supra, 507 U.S. at 514. Interpreting the same language as is at issue in this case, the Court concluded that § 205(now § 206) says what it means, and means what it says – that all limitations periods are tolled during a servicemember's period of military service.

Certainly, the authority of local governments to enforce and collect lawfully assessed and levied taxes implicates state sovereignty and the ability of local governments to conduct their own affairs, to at least the same extent as the authority to involuntarily annex territory involved in this appeal. Nevertheless, this Court in *Conroy* concluded that the Federal statute's unambiguous tolling provisions applied and rejected the respondent's claim that the soldier needed to show prejudice to get the benefit of the tolling statute because the language of § 205 was so clear.

This Honorable Court has often cited the first rule of statutory construction – to effectuate the intent of the legislature. The first place to look for that intent is the language of the statute itself. *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the language of the statute. . . And where the statutory language provides a clear answer, it ends there as well."). As Chief Justice Marshall stated nearly two hundred years earlier:

> The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case might be a strong one indeed, which would justify a court in departing from the plain

> meaning of words. . . in search of an intention which the words themselves did not suggest.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820). The language of Section 206(a) is plain, clear and unambiguous, and the State Courts erred when they "depart[ed] from the plain meaning" of the statute, contrary to this Court's holdings in *Hughes Aircraft* and *Wiltberger*.

This Court agreed with Petitioners' argument on this point in *LeMaistre v. Leffers*, 333 U.S. 1, 4 (1948), an appeal concerning the interpretation and application of Section 205 of the 1940 Act. In *LeMaistre*, the Florida courts had denied the petitioner relief under the Act in a property tax foreclosure/redemption proceeding reasoning that § 500 of the Act limited the tolling provision to real property owned and acquired for certain specified purposes. This Court "[saw] neither in [Section 205's] language nor in the legislative history. . . any purpose to restrict its application," and concluded as follows:

> We cannot [construe Section 205 of the Act so as to protect only those classes of real property identified in Section 500 of the Act] without drastically contracting the language of § 205 and closing our eyes to its beneficent purpose. But as we indicated on another occasion, ***the Act must be read with an eye friendly to those who dropped their affairs to answer their country's call***. *Boone v. Lightner*, 319 U.S. 561, 575 (1943). (Emphasis added).

Several state courts of last resort have similarly interpreted Section 205. *See, e.g., Blazejowski v. Stadnicki*, 317 Mass. 352 (1944) (former § 205 of the 1940 Act, tolled the limitation period for a personal injury action); *Peace v. Bullock*, 252 Ala. 155, 156, 40 So.2d 82 (1949), (§ 205's tolling

provision is "not merely directory or permissive, but. . . imperatively controlling and automatically extend[ing] the period allowed for redemption in all cases coming within its terms"); *Bank of Springfield v. Gwinn*, 390 Ill. 345, 353-354, 61 N.E.2d 245 (1945) ("the provisions of section 205 of the Soldiers' and Sailors' Relief Act of 1940. . . are self-executing and that it was not the intention of Congress to make it discretionary with the court. . .") The State Court 's decisions in this case are contrary to the conclusions reached by these other state courts of last resort.

Several Federal court decisions are likewise at odds with the State Court's decisions here. For example, in *Wolf v. Commissioner of Internal Revenue*, 264 F.2d 82 (3rd Cir. 1959), a case involving the applicability of a statute of limitations affecting members of the armed services in an estate tax proceeding, the Third Circuit Court of Appeals noted the mandatory nature of Section 205's tolling provisions. In *Bickford v. United States*, 656 F.2d 636, (Ct. Cl. 1981), the Court of Claims discussed Section 205's tolling provision in a benefits dispute with a former Army captain. The Court of Claims said regarding the statutory tolling provision:

> The express terms of the SSCRA make certain the tolling of the statute of limitations is unconditional. The only critical factor is military service; once that circumstance is shown, the period of limitations is automatically tolled for the duration of service. . . There is no ambiguity in the language of § 525 and no justification for the court to depart from the plain meaning of its words. . . When Congress intended to impose conditions on the applicability of other provisions in the SSCRA. . . . it did so in clear terms.

In *Mason v. Texaco, Inc.*, 862 F.2d 242 (10th Cir. 1988), a products liability case involving a member of the U.S. Coast Guard, the 10th Circuit Court found "the language of [§ 205]. . . clear and unambiguous" and found "no reason to ignore the plain meaning of the statute." *Id.*, citing, *inter alia, Ricard v. Birch*, 529 F.2d 214 (4th Cir. 1975).

In *Ricard*, the Fourth Circuit Court of Appeals reversed the dismissal of a wrongful death action and said regarding Section 205 that "[t]he tolling statute is unconditional. The only critical factor is military service, once that circumstance is shown, the period of limitations is automatically tolled. . ." *Ricard v. Birch, supra*, 529 F.2d at 217.

Twenty years later the Fourth Circuit Court of Appeals, in *Kerstetter v. United States*, 57 F.3d 362 (4th Cir. 1995) reached the same conclusion as the Supreme Court in *Conroy* and as the various other courts cited above. In *Kerstetter*, the Fourth Circuit Court of Appeals reversed the dismissal of a former servicemembers' derivative claim. The Court relied on the language which is now Section 206(a) of the Act, and said as follows:

> ***. . . the [Act] tolls "any action or proceeding in any court. . . by or against any person in military service." The Act's] plain language requires that we hold that it tolled the running of the FTCA's statute of limitations on [the father's] claim. . .***

Kerstetter v. United States, supra, 57 F.3d at 367. In *Detweiler v. Pena*, 38 F.3d 591 (D.C. Cir. 1994) a serviceman's action for review of a decision by the Coast Guard Board for the Correction of Military Records, the D.C. Circuit Court held that Section 205 tolled the applicable three year limitation period, stating that "[t]he command of § 205 is

unexceptional. It tolls 'any' limitations period 'now or hereafter' appearing in 'any' law for the bringing of 'any' action before 'any' court, board or bureau." (citing *Conroy v. Aniskoff).* The D.C. Circuit Court refused to seek any unspecified (in the statute) exceptions to the tolling language, noting that Congress built some exceptions into the statute and stating that "[w]here a statute contains explicit exceptions, the courts are reluctant to find other implicit exceptions." *Detweiler v. Pena,* supra, 38 F.3d at 594; citing *Consumer Product Safety Commissioner v. GT/ Sylvania, Inc.,* 447 U.S. 102, 109 (1980).

When Congress re-enacted the Act in December 2003, it is presumed to have been aware of the nearly 60 years of judicial decisions concerning the tolling provisions of Section 206(a) (Section 205 prior to the 2003 re-codification). *Cannon v. University of Chicago,* 441 U.S. 677, 696-697 (1979) [i]t is always appropriate to assume that our elected representatives, like our citizens, know the law."); *see also Conroy v. Aniskoff, supra,* 507 U.S. at 516 (the Court "presumed that Congress was familiar with" several Supreme Court decisions when it amended the Act in 1940 and 1948). With that presumed knowledge, Congress chose to use clear and unequivocal terms in Section 206(a) – "[t]he period of a servicemember's military service may not be included in computing any period limited by law. . . for the bringing of any action or proceeding in a court. . . of a State. . ." Congress could not have been more clear about what it intended. Section 206(a) of the Act clarifies what Section 205 of the former Act said, and what the United States Supreme Court in *Conroy,* the Fourth Circuit Court in *Ricard* and *Kerstetter,* and numerous other Courts, said about the language: **the tolling provision is automatic once a person invoking it establishes the only criterion – military service.**

That Congress was aware of the history of the Act is evident from the legislative history of the 2003 re-codification. The Senate Committee in Veterans Affairs' Report on the Act (prior to its adoption) reflects, among other things, the Defense Department's support of the proposed amendments based on "[t]he need to modernize the language of the Act [and] incorporate over 60 years of case law." Senate Report No. 108-197, Statement of Craig Duehring, Principal Deputy Assistance Secretary of Defense for Reserve Affairs, p. 17. Here, Section 206 of the Act is a revision of the former Section 205 of the 1940 Act. When it clarified former § 205 and enacted present § 206, Congress carved out a single, explicit exception to the tolling provisions for limitations "under the internal revenue laws of the United States," 50 App. U.S.C. § 526(c), but did not in any other way qualify the broad applicability of the tolling language.

III. APPLYING § 206's TOLLING PROVISION TO THE ANNEXATION CHALLENGE WILL NOT INTERFERE WITH RESPONDENT'S SOVEREIGNTY NOR WILL IT LEAD TO AN ABSURD RESULT.

The North Carolina Court of Appeals was concerned applying the tolling provision of § 206(a) as Petitioners suggest would unduly interfere with state sovereignty. However, this Court has recognized in various decisions that Congress may, under appropriate circumstances, enact laws which impinge on local government functions.

The City and the State Courts relied, at least in part, on this Court's turn-of-the-twentieth-century decision in *Hunter v. Pittsburgh*, 207 U.S. 161, 52 L.Ed. 151 (1907) in which this Court refused to interfere with an annexation by the City of Pittsburgh of the neighboring City of Allegheny under Pennsylvania's then-existing annexation laws. In

Hunter, the petitioners challenged the constitutionality of Pennsylvania's annexation statutes. This Court affirmed the Pennsylvania Supreme Court decision which upheld the annexation because this Court did not want to interfere with Pennsylvania's statutory annexation process. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-179. The petitioners in *Hunter* asked this Court to declare unconstitutional the duly enacted Pennsylvania statute governing involuntary annexations. Petitioners herein made no such request, as the constitutionality of North Carolina's involuntary annexation statutes appears to be well-settled. Rather, they simply seek to exercise the right granted by N.C. Gen. Stat. § 160A-50(a) to review one, particular, Annexation Ordinance, but have been deprived of a hearing on the merits by the State Courts' decisions not to enforce the unconditional tolling provision of § 206(a).

Congress almost routinely enacts laws which, in one way or another, impact state sovereignty. This Court has upheld Congress' power to do so in the face of challenges based on the impact of a federal law on state sovereignty. Petitioners have already cited some examples involving the Act, such as *Conroy* and *LeMaistre*. Another example is *Case v. Bowles*, 327 U.S. 92 (1946), which involved the application of the Federal Emergency Price Control Act on the sale of school-land timber by Washington State's Commissioner of Public Lands. The State argued that the Federal government could not subject such sales to price controls because to do so impacted one of the State's "essential governmental functions." This Court affirmed the Ninth Circuit Court of Appeals' decision that the Federal statute did grant authority to set maximum prices for school-land timber sold by the State, relying on Article VI of the United States Constitution.

In *Jinks v. Richland County*, 538 U.S. 456 (2003), this Court reversed a South Carolina Supreme Court decision dismissing a state law claim against Richmond County as time-barred. The federal statute involved in the case, 28 U.S.C. § 1367(d), tolls the state statute of limitations while a state cause of action is pending as part of an action in federal court. Richmond County contended that § 1367(d) was facially invalid because it exceeded the enumerated powers of Congress. This Court said as follows regarding the tolling provision:

> Although the Constitution does not expressly empower Congress to toll limitations periods for state-law claims brought in state court, it does give Congress the authority "to make all Laws which shall be necessary and proper for carrying into Execution [Congress' Article I, § 8] powers and all other Powers vested by this Constitution in the Government of the United States. . .

Jinks v. Richland County, supra, 538 U.S. at 461. This Court, in *Jinks*, noted its 1871 decision in *Stewart v. Kahn*, 11 Wall. 493 (1871) where this Court "upheld as constitutional a federal statute that tolled limitations periods for state-law, civil and criminal cases for the time during which actions could not be prosecuted because of the civil war. We reason that this law was both necessary and proper for carrying into effect the Federal Government's war powers. . ." So, this Court has recognized for more than 130 years that Congress has authority to enact laws which toll state limitations periods, and did not find such tolling provisions to unduly interfere with state sovereignty.

In *Jinks*, Richland County also argued that § 1367(d)'s tolling provision as applied in that case constituted an impermissible abrogation of the county's "sovereign

immunity." This Court rejected that argument, citing *Alden v. Maine*, 527 U.S. 706 (1999) for the proposition that Congress may subject a municipality to suit in state court if it is done pursuant to a valid exercise of Congress' enumerated powers. This Court said, in *Jinks*, as follows:

> A State's authority to set the conditions upon which its political subdivisions are subject to suit in its own courts must yield to the enactments of Congress. This is not an encroachment on "state sovereignty"... In any event, the idea that an "unmistakenably clear" statement is required before an Act of Congress may expose a local government to liability cannot possibly be reconciled with our holding in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), that municipalities are subject to suits as "persons" under § 1983.

Jinks v. Richland County, supra, 538 U.S. at 466-467.

Petitioners' interpretation of § 206(a) will not yield an absurd result. In *Conroy v. Aniskoff*, the respondent argued, in opposition to the application of former § 205 of the Act, that a literal interpretation of the Act would produce illogical and absurd results. *Conroy v. Aniskoff, supra*, 507 U.S. at 514. A similar argument was advanced by the City in the State Courts when it argued that application of the tolling provision would render it nearly impossible for municipal annexations to achieve "finality." The City urged that, notwithstanding the plain language of § 206(a), if Petitioners' argument were accepted by the Court, it would lead to an absurd result. This Court disposed of just such an argument in *Conroy*, finding that "both the history of [the]... statute and our history of interpreting it refute any argument that a literal construction of § 525 is so absurd

or illogical that Congress could not have intended it. . . Since we presume that Congress was familiar with [various precedents involving in § 525] we also assume that Congress considered [those precedents]. . . when it permanently extended the Act in 1948." *Id.* at 516. As previously stated, the legislative history of the 2003 recodification of the Act makes abundantly clear that Congress was aware of the more than 60 years of case law interpreting the Act – including this very tolling provision. Congress considered and adopted only one exception to the tolling provision - § 206(c) with respect to claim under internal revenue law - but no others. Judicially creating another exception, as the State Courts have done, is an absurd result.

Finally, regarding the "absurd result" argument, Petitioners note that some federal courts – the Court of Claims in *Deering v. United States, supra,* the Federal Circuit Court of Appeals in *Foster v. United States,* 733 F.2d 88 (Fed. Cir. 1984), and the District of Columbia Circuit Court of Appeals in *Detweiler v. Pena, supra,* – and the North Carolina Court of Appeals in *Taylor v. N.C. Dept. of Transportation,* 86 N.C. App. 299, 357 S.E.2d 439 (N.C. App. 1987), all recognized that the tolling provision of former § 205 – now § 206 – does not apply to or affect an affirmative defense of laches. Application of that equitable doctrine in appropriate circumstances will avoid the harmful result the City fears – delay in finality of local government action. The State Courts ignored these precedents when they dismissed the Petitions.

IV. THE SERVICEMEMBERS' CIVIL RELIEF ACT RESTS ON THE AUTHORITY OF THE WAR POWERS AND, THEREFORE, THE ACT SHOULD TAKE PRECEDENCE OVER ANY STATE INTEREST CLAIMED BY RESPONDENTS.

The State Courts decisions were based in large part on concern about the tolling statute's impact on the City's right to govern its own affairs. The City had argued that applying Section 206(a) of the Act in this case would unduly interfere with the City's ability and authority to govern itself. The State Courts, citing *Nixon v. Missouri Municipal League* and *Gregory v. Ashcroft*, concluded that "[a]bsent an unmistakably clear intent that Congress intended a federal statute to interfere with a State's power to control its municipal subdivisions, a court should construe the statute to avoid that effect." (App. p. 39a). It is an argument similar to the one raised by Onslow County, North Carolina more than twenty years ago in *United States v. Onslow County*, 728 F.2d 628 (4th Cir. 1984), and rejected by the Fourth Circuit Court of Appeals.

In *Onslow County*, the Board of Education required that all non-domiciliary students enrolled in the Onslow County public schools be charged tuition for the upcoming school year. The United States and military personnel with children enrolled in the Onslow County public schools challenged the tuition requirement on several grounds, including § 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, which essentially protected servicemembers from double taxation. The federal district court granted summary judgment for the plaintiffs on the ground that the tuition requirement violated the Supremacy Clause of the United States Constitution. The Fourth Circuit Court of Appeals affirmed that determination, and devoted a substantial portion of its decision to analyzing the purpose of Soldiers'

and Sailors' Civil Relief Act in relation to the challenged Board of Education action.

The Fourth Circuit Court of Appeals considered whether there was a conflict between the Act and the Board of Education's tuition requirement, all the time keeping in mind that the Act "must be read with an eye friendly to those who drop their affairs to answer their country's call." *United States v. Onslow County, supra,* 728 F.2d at 636, citing *LeMaistre v. Leffers,* 333 U.S. 1, 6, 68 S.Ct. 371, 373, 92 L.Ed. 429 (1948). The Fourth Circuit concluded that the Act was "enacted as a 'necessary and proper' means to effectuate the War Powers of Congress under Article I, S. 8, Cl. 18 of the Constitution," and recognized Congress' "predominant role over the states in formulating military policy under the Constitution," when it struck down Onslow County's tuition requirement as unconstitutional under the Supremacy Clause.

The Fourth Circuit Court of Appeals also rejected Onslow County's Tenth Amendment argument against pre-emption. The Court recognized that the Tenth Amendment "has typically been understood as a rule of construction, simply reserving to the state any residual powers which the federal government cannot without pretext claim as either enumerated or implied, and which are not barred to government at any level by express constitutional prescriptions." *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 406, 421, 423, 4 L. Ed. 579 (1819). The Court concluded in *Onslow County* that the Soldiers' and Sailors' Civil Relief Act "rests on the authority of the War Powers, which have been described as 'among the vital powers of Congress, essential to the protection of the Nation.'" *United States v. Onslow County, supra,* 728 F.2d at 639, citing *Peel v. Florida Dept. of Transportation,* 600 F.2d. 1070 (5th Circuit, 1979) (where the Fifth Circuit Court of Appeals ruled that the Veterans' Reemployment Rights Act, 38 U.S.C. § 2021-2026

(1976) adopted under Congress' War Powers authority, did not unduly encroach on State's integral governmental functions, like its right to hire and fire employees).

The Fourth Circuit Court of Appeals said as follows in *Onslow County*:

> The matters with which the War Powers deal are national in character, and the states play no role in formulating military policy or providing for the national defense. . . ***[b]ecause the provision of the Relief Act here in question was properly enacted pursuant to Congress' enumerated War Powers and the Necessary and Proper Clause it is constitutional as applied to the states and their subdivisions notwithstanding the Tenth Amendment.***" (emphasis added).

United States v. Onslow County, 728 F.2d at 640-641.

Onslow County is also instructive on the issue of whether the Act unduly interferes with traditional state/local government functions. The Onslow County Board of Education argued, in part, that § 514 of the Act unduly interfered with the Board's ability to provide the educational services it was obligated by law to provide. In the State Courts Respondent made the same argument – that applying Section 206(a) as Petitioners urge would unduly interfere with Respondent's ability, and state law authority, to determine its boundaries and to govern itself. The Fourth Circuit Court of Appeals rejected the Board's argument, noting that the Act "burdens only those few localities in any state which are home to large federal military installations," which localities "derive considerable benefit from the presence of military bases," particularly in the jobs created and revenues generated by the bases'

presence. *United States v. Onslow County, supra,* 728 F.2d at 639. The Fourth Circuit Court of Appeals relied in part on the Fifth Circuit's decision in *Peel, supra,* where the Court said:

> ***The war power. . . is one of the vital powers of Congress, essential to the protection of the nation. Where, as in this case, Congress has acted in a direct manner under its war power and has not unduly encroached upon the state's integral government functions, the tenth amendment is not a limitation on its power. . .*** (emphasis added).

Peel v. Florida Dept. of Transportation, supra, 600 F.2d at 1084 (5th Cir. 1979). In *Peel,* as in *Onslow County,* the court concluded that when conflict arises between a federal statute enacted under the War Powers and a state statute, the balance almost always tips in favor of the federal law notwithstanding the Tenth Amendment. *United States v. Onslow County, supra,* 728 F.2d at 639-640. Here, the State Courts concluded that the 60-day limitation period for challenging involuntary annexation ordinances established by N.C. Gen. Stat. § 160A-50(a), meant to bring swift finality to governmental actions, outweighs the tolling provision of § 206(a) of the Act, meant to protect those in the military attending to the defense of the Nation from concerns about civil legal matters. The clear weight of authority lies contrary to this position.

The Servicemembers Civil Relief Act was initially adopted and subsequently amended under Congress' war powers in order to free members of our armed forces from concerns about their personal civil legal affairs while engaged in the defense of our nation. When Congress clarified and recodified the Act in 2003, it left the unambiguous tolling language now found in § 206(a) intact,

even after more than 50 years of court decisions interpreting it nearly uniformly as Petitioners suggest. Petitioners' rights under the Act outweigh any harm claimed by the City based on intrusion on its exercise of its governmental powers.

CONCLUSION

Petitioners have found no authority in any jurisdiction addressing the specific question presented here - whether the tolling provision of § 206(a) applies to the statutory period for challenging local government action such as the Annexation Ordinance here. It appears that this specific question has not been addressed by any court in a recorded decision. However, Petitioners submit that based on the mandatory, unconditional and non-discretionary tolling provisions of Section 206 of the Act, the Petitions were timely. The Petitions state claims for relief pursuant to N.C. Gen. Stat. § 160A-50(a). The clear weight of legal authority supports Petitioners arguments on this point, and the existing State Courts decisions to the contrary conflict with this Court's decision in *Conroy* (among others), the Fourth Circuit's decisions in *Ricard*, *Onslow County* and *Kerstetter*, and the decisions of other state courts of last resort.

For the reasons stated herein, Petitioners pray that this Court grant the Petition for Writ of Certiorari and hear the merits of Petitioners' appeal.

This the 14th day of November, 2005.

THE BROUGH LAW FIRM

Robert E. Hornik, Jr.
N.C. State Bar # 23728
Ste. 800-A, 1829 E. Franklin St.
Chapel Hill, North Carolina 27514
(919) 929-3905

Attorney for Petitioners

APPENDIX

TABLE OF CONTENTS
APPENDIX TO PETITION

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NO. COA04-1123

NORTH CAROLINA COURT OF APPEALS

Filed: 7 June 2005

[ENTERED: JUNE 7, 2005]

KEITH KEGLEY, and
KIMBER KEGLEY, CECIL
HAMMONDS, and MAGGIE
HAMMONDS, and CHADWICK
J. McKEOWN,
Petitioners,

v. Cumberland County
No. 04 CVS 4483

THE CITY OF FAYETTEVILLE, a
North Carolina Municipality,
Respondent.

Appeal by petitioners from order entered 28 June 2004 by Judge Gary L. Locklear in Cumberland County Superior Court. Heard in the Court of Appeals 13 April 2005.

Parker, Poe, Adams, & Bernstein, L.L.P., by R. Bruce Thompson II, and Anthony Fox; and City Attorney Karen M. McDonald, for respondent appellee.

The Brough Law Firm, by Robert E. Hornik, Jr., for petitioner appellants.

Andrew L. Romanet, Jr., and Gregory F. Schwitzgebel, III, for North Carolina League of Municipalities, Amicus Curiae.

McCULLOUGH, Judge.

Petitioner appellants appeal from an order granting respondent's motion to dismiss. On 24 November 2003, the City of Fayetteville adopted an ordinance annexing approximately 28 square miles of land and over 40,000 residents. The annexation was to become effective on 30 June 2004. In North Carolina, an owner of annexed property can seek judicial review if he or she files a 2 petition "[w]ithin 60 days following the passage of an annexation ordinance." N.C. Gen. Stat. § 160A-50(a) (2003).

A group of Cumberland County residents, the Gates Four community, filed the only timely petition for review. The City of Fayetteville and Gates Four settled their dispute, and pursuant to N.C. Gen. Stat. § 160A-50(m) (2003), the superior court entered a consent judgment on 12 May 2004. Thus, the Gates Four community was excluded from the annexation.

Petitioners filed this challenge on 14 June 2004. This was five months after the 60-day period had ended, two-and-a-half years after the annexation was first publicized, and sixteen days before the annexation's effective date.

Although they petitioned for review after the 60-day period ended, petitioners argued that the federal Servicemembers Civil Relief Act ("Act") tolled their

time to seek review. The trial court rejected this contention and dismissed the action as time-barred on 28 June 2004. Petitioners appeal.

On appeal, petitioners argue that the trial court erred by dismissing their petition as time-barred. We disagree and affirm the decision of the trial court.

Petitioners contend that the trial court erred in dismissing their appeal. Although they acknowledge that they sought judicial review after the 60-day period ended, petitioners argue that the Act tolled their time to seek review. They rely on Section 206 of the Act which states that:

> The period of a servicemember' s military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

50 App. U.S.C. § 525 (as amended by Pub. L. 108-189, § 20S(a) Dec. 19, 2003)) .

Petitioners suggest that since they were in the military during the 60-day period, the Act tolled the statutory period for them. We disagree.

As announced by the United States Supreme Court, the plain statement rule dictates that a federal statute cannot be interpreted to intrude upon state sovereignty unless the statute contains a plain statement showing an unmistakably clear intent to intrude. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 115 L. Ed. 2d 410, 424 (1991). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461, 115 L. Ed. 2d at 424. Therefore, the plain statement rule preserves the balance between state and federal power by ensuring that courts do not accidentally erode state power where Congress did not intend such a result.

Recently, the United States Supreme Court confirmed that the plain statement rule applies when a federal statute intends to interfere with a state's regulation of its municipalities. *Nixon v. Missouri Municipal League*, 541 U.S. 125, 158 L. Ed. 2d 291 (2004). In *Nixon*, the federal Telecommunications Act of 1996 prohibited the states from barring "any entity" from the telecommunications business. *Id.* at 128, 158 L. Ed. 2d at 298. However, the State of Missouri adopted a statute prohibiting its own municipalities from providing telecommunications services. *Id.* at 129, 158 L. Ed. 2d at 298. Municipalities in Missouri challenged the state statute arguing that they fell within the federal Act's broad "any entity" language; the municipalities also claimed that the federal statute preempted the state law and invalidated Missouri's attempt to bar them from the telecommunications business. *Id.*

The United States Supreme Court rejected the municipalities' claim and declined to inject a federal statute into a state's sovereign right to govern its municipal subdivisions:

> Preemption [by the Federal Telecommunications Act] would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion."

Id. at 140, 158 L. Ed. 2d at 305 (citation omitted). The Supreme Court also explained that

> federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires.

Id. Therefore, in spite of the broad "any entity" language, the Supreme Court found no plain statement for the Telecommunications Act to apply to municipalities.

Although they are undertaken by municipalities, annexations derive from this State's

sovereign power. The North Carolina Constitution vests the General Assembly with the exclusive, but delegable power, to regulate municipal borders. N.C. Const, art. VII, § 1. Municipal borders are fundamentally a State concern because municipalities are agents of the State. See *Smith v. Winston-Salem*, 247 N.C. 349, 354, 100 S.E.2d 835, 838 (1957) ("A municipal corporation, city or town, is an agency created by the State to assist in the civil government of a designated territory and the people embraced within these limits."). Therefore, to interfere with how the General Assembly shapes municipal borders is to interfere with its sovereignty.

The issue is whether the federal Act contains a plain statement showing an unmistakably clear intent to intrude upon North Carolina's state sovereignty in the area of annexations. For several reasons, we conclude that it does not.

First, the word "annexation" appears nowhere in the statute, and petitioners have not cited a single case in which the tolling provision applied to annexations. It is difficult to imagine that Congress, intending to so dramatically alter state annexations, did so casually and quietly. If Congress truly aimed to overhaul state annexations, it surely would have used the word "annexation" at least once.

Second, the Act's fundamental purpose is to address personal financial claims, not large-scale government action. Numerous provisions seek to relieve servicemembers from worrying about standard financial claims and transactions. For instance, Section

201 limits creditors' ability to obtain default judgments against servicemembers. 50 App. U.S.C. § 525 (as amended by Pub. L. 108-189, § 201, Dec. 19, 2003). Section 207 lowers interest rates for indebtedness. *Id.* at § 207. Section 301 restricts evictions of servicemembers. *Id.* at § 301. And, other sections affect termination of motor vehicle leases, limit foreclosures against property, and protect servicemembers' rights under life insurance policies. Finally, and perhaps most importantly, petitioners have failed to cite a single case which applies the Act to non-personal claims challenging large-scale government action.

In fact, accepting respondents' position would cripple the way municipalities determine their borders. Indefinitely tolling the time to challenge annexations would give individual servicemembers substantial power over governments and entire communities. Petitioners concede that under their interpretation of the law, a single servicemember could challenge the validity of an annexation for years or even decades after the annexation's completion. Our courts presume that the legislature acted reasonably and "'did not intend an unjust or absurd result. . . .'" *Best v. Wayne Mem'l Hosp., Inc.*, 147 N.C. App. 628, 635, 556 S.E.2d 629, 634 (2001) (citation omitted), *appeal dismissed, disc, review denied*, 356 N.C. 433, 572 S.E.2d 426 (2002). Allowing a single servicemember to hold up an annexation for years and perhaps decades would paralyze a municipality's ability to provide services to its citizens. This absurd and potentially damaging result goes beyond the stated purpose of the Act which allows "the *temporary* suspension of judicial and administrative proceedings [.]" 50 App. U.S.C. § 525 (as

amended by Pub. L. 108-189 § 2(2)). It further reveals that Congress did not intend to intrude upon North Carolina's state sovereignty in the area of annexations.

Finally, we cannot grant petitioners' relief because it is overly broad. Section 2 of the Act is designed "to provide for the *temporary* suspension of judicial and administrative proceedings . . . that may adversely affect the civil *rights of servicemembers during their military service.*" *Id.* (emphasis added). In the present case, petitioners have not asserted any personal right. They have not sought to limit the scope of the annexation or exclude their property from the annexation as the members of the Gates Four community did. Instead, the relief requested is a complete nullification, or at the very least, a potential long-term holdup, of the annexation. This remedy is broad and would go beyond the stated purpose of the Act. Nullifying an annexation is not simply an action to preserve the rights of servicemembers during their military service. Rather, it would allow the tolling provision to be improperly applied to *non-servicemembers*, people who would then receive the benefits and burdens of having the annexation nullified even if they failed to take timely action in seeking judicial review. Furthermore, as petitioners have acknowledged, the relief they request is not temporary because it could halt the annexation almost indefinitely.

While we recognize and appreciate the sacrifices of the members of our armed forces, we believe that Congress did not intend to defeat municipalities' ability to operate, including their ability to complete

annexations with finality. Petitioners did not seek to exempt their own property and did not seek judicial review within the 60-day time period. The Act's tolling provision has never been applied to large-scale governmental action, such as annexations. Finally, since the Act does not reveal a clear intent to intrude upon North Carolina's state sovereignty in the area of annexations, we hold that the trial court acted properly in granting respondent's motion to dismiss. The order is

Affirmed.

Judges HUNTER and LEVINSON concur.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

September 28, 2005

Mr. Robert E. Hornik, Jr.
Brough Law Firm
Suite 800-A
1829 E. Franklin Street
Chapel Hill, NC 27514

Re: Keith Kegley, et al.
v. City of Fayetteville, North Carolina
Application No. 05A281

Dear Mr. Hornik:

The application for a stay in the above-entitled case has been presented to Justice Thomas, who on September 28, 2005 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

By /s/ Troy D. Cahill
Staff Attorney

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Robert E. Hornik, Jr.
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Suite 800-A
1829 E. Franklin Street
Chapel Hill, NC 27514

Mr. Bruce Thompson
Parker, Poe, Adams & Bernstein
150 Fayetteville St. Mall
Suite 1400
P.O. Box 389
Raleigh, NC 27602-0389

North Carolina Reports

KEGLEY V. CITY OF FATETTEVILLE,
342P04-3 (N.C. 9-13-2005)

Kegley v. City of Fayetteville.

No. 342P04-3

Supreme Court of North Carolina

September 13, 2005

[ENTERED: SEPTEMBER 13, 2005]

The following order has been entered on the motion filed on the 12th day of September 2005 by Petitioners for Urgent Stay Pending Appeal:

> Motion Denied by order of the Court in conference this the 13th day of September 2005.

Brady, J. recused

No. 342P04-3 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
(Kegley v City of Fayetteville)

KEITH KEGLEY, and KIMBER KEGLEY,
CECIL HAMMONDS, and MAGGIE
HAMMONDS, and CHADWICK J. McKEON
v

THE CITY OF FAYETTEVILLE,

From NC Court of Appeals
(COA04-1123)
From Cumberland
(04CVD4483)

[ENTERED: SEPTEMBER 13, 2005]

ORDER

Upon consideration of the petition filed by Petitioners on the 12th day of September 2005 for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 13th day of September 2005.

Brady, J. recused.

s/ Edmunds, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of September 2005.

Christie Speir Cameron
Clerk, Supreme Court
of North Carolina

/s/ Shaula A. Brannan
Shaula A. Brannan
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. Robert E. Hornick, Jr., Attorney at Law,
For Keith Kegley, et al (by E-Mail)
Ms. Karen M. McDonald, City Attorney,
For City of Fayetteville
Mr. Benjamin R. Sullivan, City of Fayetteville,
For City of Fayetteville (by E-Mail)
Mr. Anthony Fox, Attorney at Law,
for City of Fayetteville
West Publishing Company (By E-mail)
Lexis-Nexis (By E-mail)
LOIS Law (By E-mail)

No. 342P04-2 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
(Kegley v City of Fayetteville)

KEITH KEGLEY, and KIMBER KEGLEY,
CECIL HAMMONDS, and MAGGIE
HAMMONDS, and CHADWICK J. McKEON
v

THE CITY OF FAYETTEVILLE,
a North Carolina Municipality

From NC Court of Appeals
(COA04-1123)
From Cumberland
(04CVD4483)

[ENTERED: AUGUST 19, 2005]

ORDER

Upon consideration of the conditional petition filed on the 15th day of July 2005 by Respondent in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Dismissed as moot by order of the Court in conference, this the 18th day of August 2005.

Brady, J., Recused.

s/ Newby, J.
For the Court"

. WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of August 2005.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina

/s/ Shaula A. Brannan
Shaula A. Brannan
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. Robert E. Hornick, Jr., Attorney at Law,
For Keith Kegley, et al
Ms. Karen M. McDonald, City Attorney,
For City of Fayetteville
Mr. Anthony Fox, Attorney at Law,
For City of Fayetteville
West Publishing Company (By E-mail)
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No. 342P04-2 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
(Kegley v City of Fayetteville)

KEITH KEGLEY, and KIMBER KEGLEY,
CECIL HAMMONDS, and MAGGIE
HAMMONDS, and CHADWICK J. McKEOWN

v

THE CITY OF FAYETTEVILLE,
a North Carolina Municipality

From NC Court of Appeals
(COA04-1123)
From Cumberland
(04CVD4483)

[ENTERED: AUGUST 19, 2005]

ORDER

Upon consideration of the petition filed on the 6th day of July 2005 by Petitioners (Keith Kegley and Kimber Kegley, Cecil Hammonds and Maggie Hammonds, and Chadwick J. McKeown) in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 18th day of August 2005.

Brady, J., Recused.

s/ Newby, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of August 2005.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina

/s/ Shaula A. Brannan
Shaula A. Brannan
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. Robert E. Hornick, Jr., Attorney at Law,
For Keith Kegley, et al
Ms. Karen M. McDonald, City Attorney,
For City of Fayetteville
Mr. Anthony Fox, Attorney at Law,
For City of Fayetteville
West Publishing Company (By E-mail)
Lexis-Nexis (By E-mail)
LOIS Law (By E-mail)

SUPREME COURT OF NORTH CAROLINA
CHRISTIE SPEIR CAMERON, Clerk
Justice Building, 2 E. Morgan Street
Raleigh, NC 27601
(919) 733-3723

Fax: (919) 733-0105
Web: www.nccourts.org

Mailing Address:
P.O. Box 2170
Raleigh, NC 27602

29 July 2004

Ms. Karen M. McDonald
City Attorney
City of Fayetteville
433 Hay Street
Fayetteville, NC 28301-5537

From NC Court of Appeals
(COAP04-570)
From Cumberland
(04CVS4483)

Re: Kegley, et al v City of Fayetteville - No. 342P04

Dear Ms. McDonald:

The following order has been entered on the motion filed on the 26th day of July 2004 by Respondent for Reconsideration:

"Motion Dismissed by order of the Court in conference this the 29th day of July 2004.

s/ Brady, J.
For the Court"

Very truly yours,

Christie Speir Cameron
Clerk of Supreme Court

/s/ Lou A. Newman
Lou A. Newman
Assistant Clerk

Copy to:
West Publishing (by E-Mail)
Lexis-Nexis (by E-Mail)
LOIS Law (by E-Mail)
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. Robert E. Hornick, Jr., Attorney at Law,
For Kegley, et al
Mr. Anthony Fox, Attorney at Law,
For City of Fayetteville
Mr. C. Wes Hodges, II, Attorney at Law,
For City of Fayetteville

No. 342P04 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

KEITH KEGLEY and KIMBER KEGLEY,
CECIL HAMMONDS and MAGGIE HAMMONDS,
and CHADWICK MCKEOWN

v. From Cumberland County

CITY OF FAYETTEVILLE,
a North Carolina Municipality

[ENTERED: JULY 13, 2004]

ORDER

This Court allowed a temporary stay in this case on 12 July 2004. As to the other motions filed in this cause, the Court orders as follows:

Petitioners' Petition for Writ of Supersedeas is allowed. The portion of Judge Locklear's Order of 28 June 2004 that provides that "neither [petitioners'] Petition or Amended Petition, nor any other aspect of this proceeding, shall modify the June 30, 2004 effective date of the City's Annexation Ordinance" is stayed pending appeal.

Petitioners' Petition for Writ of Certiorari to review the Court of Appeals' Order entered 7 July 2004 dissolving the temporary stay of the Annexation Ordinance and denying Petitioners' Petition for Writ of Supersedeas to the Court of Appeals is denied.

Petitioners' Application for Discretionary Review (prior to determination by the North Carolina Court of Appeals) by this Court of Judge Locklear's Order Granting Respondent's Motion to Dismiss is denied.

Petitioners' application for an order staying the portions of Judge Locklear's Order to the effect that respondent's Annexation Ordinance is effectively amended to make the effective date of the ordinance the last day of the next full calendar month following the date of the final judgment in connection with petitioners' appeal to the appellate division, is allowed.

Respondent's Urgent Motion to Dissolve the Temporary Stay or, Alternatively, to Expedite Review, is denied.

By order of the Court in Conference, this 13th day of July, 2004.

/s/_____
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of July, 2004.

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

/s/ Christie S. Cameron
Clerk

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. Robert E. Hornick, Jr., Attorney at Law,
For Kegley, et al
Ms. Karen M. McDonald, City Attorney,
For City of Fayetteville
Mr. Anthony Fox, Attorney at Law,
For City of Fayetteville
Mr. C. Wes Hodges, II, Attorney at Law,
For City of Fayetteville
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12 July 2004

Mr. Robert E. Hornick. Jr.
Attorney at Law
The Brough Law Firm
1829 E. Franklin St.
Suite 800-A
Chapel Hill, NC 27514

From NC Court of Appeals
(COAP04-570)
From Cumberland
(04CVS4483)

Re: Kegley, et al v City of Fayetteville - No. 342P04

Dear Mr. Hornick:

The following order has been entered on the motion filed on the 8th day of July 2004 by Petitioners for Temporary Stay:

"Motion Allowed by order of the Court in conference this the 12th day of July 2004.

s/ Edmunds, J.
For the Court"

Very truly yours,

Christie Speir Cameron
Clerk of Supreme Court

/s/ Lou A. Newman
Lou A. Newman
Assistant Clerk

Copy to:
North Carolina Court of Appeals
West Publishing (by E-Mail)
Lexis-Nexis (by E-Mail)
LOIS Law (by E-Mail)
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Ms. Karen M. McDonald, City Attorney,
For City of Fayetteville
Mr. Anthony Fox, Attorney at Law,
For City of Fayetteville
Mr. C. Wes Hodges, II, Attorney at Law,
For City of Fayetteville

No: COA04-1123 TWELFTH DISTRICT

North Carolina Court of Appeals

From Cumberland
(04CVS4483)

FILED
05 SEP 27 PM 3:19

[ENTERED: SEPTEMBER 27, 2005]

KEITH KEGLEY and KIMBER KEGLEY, CECIL HAMMONDS and MAGGIE HAMMONDS, and CHADWICK J. MCKEOWN,
Petitioners,

V

THE CITY OF FAYETTEVILLE,
a North Carolina Municipality,
Respondent.

ORDER

Petition for Discretionary Review to review the decision of the North Carolina Court of Appeals filed on the 7th day of June 2005 was denied by order of the North Carolina Supreme Court on the 18th day of August 2005, and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Cumberland County North Carolina that the North Carolina Supreme Court has denied the Petition for Discretionary Review filed by Petitioners (Keith Kegley and Kimber Kegley, Cecil Hammonds and Maggie Hammonds, and Chadwick J. McKeown) in this cause.

WITNESS my hand and official seal this the 27th day of September 2005.

/s/ John H. Connell
John H. Connell
Clerk, North Carolina Court
of Appeals

/s/ Kathy Taylor
Deputy Clerk,
North Carolina Court
of Appeals

Orig. to CSC
Copy to:
Mr. Robert E. Hornick, Jr., Attorney at Law,
For Keith Kegley, et al
Ms. Karen M. McDonald, City Attorney,
For City of Fayetteville
Mr. Anthony Fox, Attorney at Law,
For City of Fayetteville
Mr. R. Bruce Thompson
Mr. Andrew L. Romanet, Jr., General Counsel,
For NC League of Municipalities
Mr. Gregory F. Schwitzgebel, III
Senior Assistant General Counsel

No: COA04-1123 TWELFTH DISTRICT

North Carolina Court of Appeals

From Cumberland
(04CVS4483)

FILED
05 SEP 27 PM 3:19

[ENTERED: SEPTEMBER 27, 2005]

KEITH KEGLEY and KIMBER KEGLEY, CECIL HAMMONDS and MAGGIE HAMMONDS, and CHADWICK J. MCKEOWN,
Petitioners,

V

THE CITY OF FAYETTEVILLE,
a North Carolina Municipality,
Respondent.

ORDER

Petition for Discretionary Review to review the decision of the North Carolina Court of Appeals filed on the 7th day of June 2005 was dismissed as moot by order of the North Carolina Supreme Court on the 18th day of August 2005, and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Cumberland County North Carolina that the North Carolina Supreme Court has dismissed as moot the Petition for Discretionary Review filed by the Respondent in this cause.

WITNESS my hand and official seal this the 27th day of September 2005.

/s/ John H. Connell
John H. Connell
Clerk, North Carolina Court
of Appeals

/s/ Kathy Taylor
Deputy Clerk,
North Carolina Court
of Appeals

Orig. to CSC
Copy to:
Mr. Robert E. Hornick, Jr., Attorney at Law,
For Keith Kegley, et al
Ms. Karen M. McDonald, City Attorney,
For City of Fayetteville
Mr. Anthony Fox, Attorney at Law,
For City of Fayetteville
Mr. R. Bruce Thompson
Mr. Andrew L. Romanet, Jr., General Counsel,
For NC League of Municipalities
Mr. Gregory F. Schwitzgebel, III
Senior Assistant General Counsel

No: COA04-1123 TWELFTH DISTRICT

North Carolina Court of Appeals

From Cumberland
(04CVS4483)

FILED
05 SEP 26 AM 9:12

[ENTERED: SEPTEMBER 26, 2005]

KEITH KEGLEY and KIMBER
KEGLEY, CECIL HAMMONDS and
MAGGIE HAMMONDS, and
CHADWICK J. MCKEOWN,
Petitioners,

V

THE CITY OF FAYETTEVILLE,
a North Carolina Municipality,
Respondent.

ORDER

Petition for Writ of Supersedeas to review the decision of the North Carolina Court of Appeals filed on the 7th day of June 2005 was denied by order of the North Carolina Supreme Court on the 13th day of September 2005, and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Cumberland County North Carolina that the North Carolina Supreme Court has denied the Petition for Writ of Supersedeas filed by the Petitioners in this cause.

WITNESS my hand and official seal this the 26th day of September 2005.

/s/ John H. Connell
John H. Connell
Clerk, North Carolina Court
of Appeals

/s/ Kathy Taylor
Deputy Clerk,
North Carolina Court
of Appeals

Orig. to CSC
Copy to:
Mr. Robert E. Hornick, Jr., Attorney at Law,
For Keith Kegley, et al
Ms. Karen M. McDonald, City Attorney,
For City of Fayetteville
Mr. Anthony Fox, Attorney at Law,
For City of Fayetteville
Mr. R. Bruce Thompson
Mr. Andrew L. Romanet, Jr., General Counsel,
For NC League of Municipalities
Mr. Gregory F. Schwitzgebel, III
Senior Assistant General Counsel

NO. COAP04-570

North Carolina Court of Appeals

From Cumberland
(04CVS4483)

FILED
04 JUL 7 PM 4:44

[ENTERED: JULY 7, 2004]

KEITH KEGLEY AND KIMBER KEGLEY, CECIL HAMMONDS AND MAGGIE HAMMONDS, AND CHADWICK J. MCKEOWN

v

CITY OF FAYETTEVILLE, A NORTH CAROLINA MUNICIPALITY

ORDER

The following order was entered:

The motion for expedited review filed by respondent on 30 June 2004 is allowed. To that end, the petition filed in this cause by petitioners on 29 June 2004 and designated "Petition for Writ of Supersedeas Under Rule 23 N.C.R. App. P." is decided as follows: The petition for writ of supersedeas is denied and the temporary stay entered 29 June 2004 staying the annexation of respondent City of Fayetteville is hereby

dissolved. The motion to amend filed by petitioners on 1 July 2004 is allowed.

By order of the Court this the 7th day of July 2004.

The above order is therefore certified to the Clerk of Superior Court Cumberland County.

Witness my hand and official seal this the 7th day of July 2004.

/s/ John H. Connell
John H. Connell
Clerk of North Carolina
Court of Appeals

CSC Orig
cc:
Mr. G. Nicholas Herman
Ms. Karen M. McDonald
Mr. Anthony Fox
Mr. C. Wes Hodges

NO. COAP04-570

North Carolina Court of Appeals

From Cumberland
(04CVS4483)

FILED
04 JUNE 29 PM 4:26

[ENTERED: JUNE 29, 2004]

KEITH KEGLEY AND KIMBER KEGLEY, CECIL HAMMONDS AND MAGGIE HAMMONDS, AND CHADWICK J. MCKEOWN

v

CITY OF FAYETTEVILLE, A NORTH CAROLINA MUNICIPALITY

ORDER

The following order was entered:

The petition filed in this cause by petitioners on 29 June 2004 and designated "Petition for Writ of Supersedeas Under Rule 23 N.C.R. App. P. and Urgent Motion for Temporary Stay" is decided as follows: The motion for temporary stay is allowed. The annexation of respondent City of Fayetteville that is to become effective 30 June 2004 is hereby stayed pending

disposition of the petition for writ of supersedeas filed by petitioner.

By order of the Court this the 29th day of June 2004.

The above order is therefore certified to the Clerk of Superior Court Cumberland County.

Witness my hand and official seal this the 29th day of June 2004.

/s/ John H. Connell
John H. Connell
Clerk of North Carolina
Court of Appeals

CSC Orig
cc:
Mr. G. Nicholas Herman
Ms. Karen M. McDonald
Mr. Anthony Fox
Mr. C. Wes Hodges

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04-CVS-4483

FILED 04 JUN 28 AM 10:46

[ENTERED: JUNE 28, 2004]

NORTH CAROLINA

CUMBERLAND COUNTY

KEITH KEGLEY and KIMBER KEGLEY, CECIL HAMMONDS and MAGGIE HAMMONDS, and CHADWICK J. MCKEOWN

Petitioners,

v.

THE CITY OF FAYETTEVILLE, a North Carolina Municipality,

Respondent.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

This matter came to be heard on Wednesday, June 23, 2004, in the Cumberland County Superior Court before the undersigned Superior Court Judge. On November 24, 2003, pursuant to Article 4A, Part 3, Chapter 160A of the North Carolina General Statutes, Respondent the City of Fayetteville ("City") adopted an

ordinance to annex certain property in Cumberland County. The ordinance provides that its effective date is June 30, 2004. Petitioners filed a Petition on June 14, 2004, and an amended Petition on June 16, 2004, requesting judicial review of that annexation under N.C.G.S. §160A-50. The City moved to dismiss both petitions pursuant to N.C.R.C.P. 12(b)(l) and 12(b)(6) and N.C.G.S. §160A-50. Robert E. Hornik, Jr., Esq. appeared on behalf of Petitioners, and Karen McDonald, Esq. and Anthony Fox, Esq. appeared on behalf of the City. Upon the pleadings, briefs, and other materials submitted, as well as upon the arguments presented, and after due deliberation, the Court grants the City's Motion to Dismiss both the original and amended Petitions.

In granting Respondent's motion, the Court concludes the following:

(1) Under North Carolina's annexation statutes, property owners have only 60 days from the adoption of an annexation ordinance to seek a judicial review of that ordinance. N.C.G.S. §160A-50.

(2) The current Petitioners filed their original and amended Petitions after the expiration of the 60-day period for the City's annexation.

(3) Petitioners alleged that some of them had been in active service with the United States military since the City adopted its annexation ordinance, and they argued that the federal Servicemembers Civil Relief Act ("SCRA") had tolled their 60-day period to seek review during the time of their military service.

(4) Section 206 of the SCRA provides: "The period of a servicemember's military service may not be included in computing any period Limited by law ... or the bringing of any action or proceeding in a court ... by or against the servicemember[.]" Pub. Law 108-189, Sec. 206.

(5) The Court recognizes and appreciates the many sacrifices made by the members of our armed forces and their families. However, this Court is of the opinion that Congress never intended for the SCRA to defeat local municipalities' ability to operate, including their ability to conduct expedited annexations with finality; otherwise there would never be "finality" in such proceedings

(6) Annexation is an exercise of North Carolina's sovereign power. Under the State Constitution, the General Assembly has the power to fix municipal boundaries and to delegate that power to municipalities themselves. N.C. Const. Art. VII, Sec. 1. The General Assembly has delegated that power by creating a statutory framework under which municipalities may conduct their own annexations. N.C.G.S. Chapter 160A, Art. 4A, Part 3. .This annexation framework is designed to promote important State policies, including providing high-quality services to North Carolina residents. N.C.G.S. §160A-45(3).

(7) Finality of annexation proceedings is critical to their success, and it is consequently of critical importance to the State policies that annexations

advance. The absolute bar to annexation challenges that N.C.G.S. § 160A-50 imposes provides the finality necessary for municipalities to commit their limited resources to serve residents in annexed territories.

(8) If the SCRA tolled the time to seek review under N.C.G.S. §160A-50, it would undermine the finality of annexations. More than 60 days after adoption of an annexation ordinance, and even after an annexation's effective date, a servicemember still could petition for judicial review and possibly invalidate the annexation. The result would frustrate municipalities' ability to commit resources to annexed areas and to engage in long-term planning. Important State policies underlying the General Assembly's statutory annexation framework would be undermined.

(9) Absent an unmistakably clear intent that Congress intended a federal statute to interfere with a State's power to control its municipal subdivisions, a court should construe the statute to avoid that effect. *Nixon v. Missouri Municipal League*, 124 S. Ct. 1555 (2004); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

(10) While a literal reading of Section 206 would appear to make it applicable to petitions under N.C.G.S. §160A-50, the statute can reasonably be construed not to so apply. Examining the statute as a whole, its purpose appears limited to protecting servicemembers concerning personal financial matters, such as mortgages, leases, and private tort and contract claims.

(11) Petitions for annexation review differ fundamentally from the types of personal claims the SCRA is designed to toll. There is no indication that Congress intended the SCRA to disrupt large-scale government action such as annexation, thereby allowing one person to affect the interests of many.

(12) Because applying the SCRA to petitions for annexation review would substantially frustrate North Carolina's chosen annexation process, and there is no indication that this is what Congress intended, this Court interprets the statute to avoid that effect. The SCRA did not extend Petitioners' time to seek review under N.C.G.S. §160A-50.

(13) Further, even if the SCRA were intended to apply to petitions for annexation review, the Court would find it unconstitutional as so applied. The ability to provide for the establishment and alteration of municipal boundaries lies within North Carolina's sovereign power. Through its municipalities, this State provides important services and governance for its citizens, and annexation helps ensure that municipalities grow to meet citizens' needs.

(14) Applying the SCRA to toll the time to petition for review of an annexation would be an unconstitutional federal intrusion upon North Carolina's sovereign right to determine how its government will be structured.

NOW, THEREFORE, IT IS ORDERED, for the reasons provided above and for the other arguments raised by the City on its motion, that Petitioners'

request for relief in both their Petition and Amended Petition is hereby denied;

IT IS FURTHER ORDERED that, because Petitioners did not initiate this proceeding within the statutory 60-day period, their Petition and Amended Petition were not properly brought under N.C.G.S. §160A-50, and the City's annexation was never brought within this Court's jurisdiction. Therefore, neither the Petition or Amended Petition, nor any other aspect of this proceeding, shall modify the June 30, 2004 effective date of the City's annexation ordinance.

This the 28th day of June, 2004.

/s/ Gary L. Locklear
Hon. Gary L. Locklear
Superior Court Judge

50 App. U.S.C. § 526. Statute of Limitations.

(a) Tolling of Statutes of Limitation During Military Service – The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

(b) Redemption of Real Property – A period of military service may not be included in computing any period provided by law for the redemption of real property sold or forfeited to enforce an obligation, tax, or assessment.

(c) Inapplicability to Internal Revenue Laws – This section does not apply to any period of limitation prescribed by or under the internal revenue laws of the United States.

(Oct. 17, 1940, ch. 888, art. II, Sec. 206, as added Oct. 6, 1942, ch. 581, Sec. 6, 56 Stat. 771; amended Pub. L. 102-12, Sec 9(7), Mar. 18, 1991, 105 Stat. 39; as added by Pub. L. 108-189, Sec 1 [206], Dec 19, 2003, 117 Stat. 2844.)

§ *160A-50.* Appeal.

(a) Within 60 days following the passage of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this Part or to meet the requirements set forth in G.S. 160A-48 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

(b) Such petition shall explicitly state what exceptions are taken to the action of the governing board and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the person seeking review shall serve copies of the petition by registered mail, return receipt requested, upon the municipality.

(c) Within 15 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the municipality shall transmit to the reviewing court

(1) A transcript of the portions of the municipal journal or minute book in which the procedure for annexation has been set forth and

(2) A copy of the report setting forth the plans for extending services to the annexed area as required in G.S. **160A-47**.

(d) If two or more petitions for review are submitted to the court, the court may consolidate all such petitions for review at a single hearing, and the municipality shall be required to submit only one set of minutes and one report as required in subsection (c).

(e) At any time before or during the review proceeding, any petitioner or petitioners may apply to the reviewing court for an order staying the operation of the annexation ordinance pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper, and it may permit annexation of any part of the area described in the ordinance concerning which no question for review has been raised.

(f) The court shall fix the date for review of annexation proceedings under this Part, which review date shall preferably be within 30 days following the last day for receiving petitions to the end that review shall be expeditious and without unnecessary delays. The review shall be conducted by the court without a jury. The court may hear oral arguments and receive written briefs, and may take evidence intended to show either

(1) That the statutory procedure was not followed, or

(2) That the provisions of G.S. **160A-47** were not met, or

(3) That the provisions of G.S. **160A-48** have not been met.

(g) The court may affirm the action of the governing board without change, or it may

(1) Remand the ordinance to the municipal governing board for further proceedings if procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners.

(2) Remand the ordinance to the municipal governing board for amendment of the boundaries to conform to the provisions of G.S. **160A-48** if it finds that the provisions of G.S. **160A-48** have not been met; provided, that the court cannot remand the ordinance to the municipal governing board with directions to add area to the municipality which was not included in the notice of public hearing and not provided for in plans for service.

(3) Remand the report to the municipal governing board for amendment of the plans for providing services to the end that the provisions of G.S. **160A-47** are satisfied.

(4) Declare the ordinance null and void, if the court finds that the ordinance cannot be corrected by remand as provided in subdivisions (1), (2), or (3) of this subsection.

If any municipality shall fail to take action in accordance with the court's instructions upon remand within 90 days following entry of the order embodying the court's instructions, the annexation proceeding shall be deemed null and void,

(h) Any party to the review proceedings, including the municipality, may appeal to the Court of Appeals from the final judgment of the superior court under rules of procedure applicable in other civil cases. The superior court may, with the agreement of the municipality, permit annexation to be effective with respect to any part of the area concerning which no appeal is being made and which can be incorporated into the city without regard to any part of the area concerning which an appeal is being made.

(i) If part or all of the area annexed under the terms of an annexation ordinance is the subject of an appeal to the superior court, Court of Appeals or Supreme Court on the effective date of the ordinance, then the ordinance shall be deemed amended to make the effective date with respect to such area the last day of the next full calendar month following the date of the final judgment of the superior court or appellate division, whichever is appropriate, or the date the municipal governing board completes action to make the ordinance conform to the court's instructions in the event of remand. For the purposes of this subsection, a denial of a petition for rehearing or for discretionary review shall be treated as a final judgement.

(j) If a petition for review is filed under subsection (a) of this section or an appeal is filed under G.S. **160A-49.1**(g) or G.S. **160A-49.3**(g), and a stay is granted, then the time periods of two years, 24 months or 27 months provided in G.S. **160-A-47**(3)c, **160A-49**(h), or **160A-49**(j) are each extended by the lesser of the length of the stay or one year for that annexation.

(k) The provisions of subsection (i) of this section shall apply to any judicial review authorized in whole or in part by G.S. **160A-49.1**(i) or **G.S. 160A-49.3**(g).

(l) In any proceeding related to an annexation ordinance appeal under this section, a city shall not state a claim for lost property tax revenue caused by the appeal. Nothing in this Article shall be construed to mean that as a result of an appeal a municipality may assert a claim for property tax revenue lost during the pendency of the appeal-

(m) Any settlement reached by all parties in an appeal under this section may be presented to the superior court in the county in which the municipality is located. If the superior court, in its discretion, approves the settlement, it shall be binding on ell parties without the need for approval by the General Assembly.

(1959, c. 1009, s. 6; 1973, c. 426, s. 74; 1981, c. 682, ss. 20, 21; 1983, c. 636, s. 14.1; 1989, c. 598, s. 10; 1995 (Reg. Sess., 1996), c. 746, s. 3; **1998-150**, s. 18; **1999-148**, s. 1.)

No. 05-606

In The Supreme Court of the United States

KEITH KEGLEY and KIMBER KEGLEY, CECIL HAMMONDS and MAGGIE HAMMONDS, and CHADWICK J. MCKEOWN,

Petitioners,

v.

CITY OF FAYETTEVILLE, a North Carolina Municipality,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KAREN M. MCDONALD
Counsel of Record
CITY ATTORNEY
City of Fayetteville
Post Office Box 1513
Fayetteville, NC 28302
(910) 433-1985

Counsel for Respondent

ANTHONY FOX
BENJAMIN SULLIVAN
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401 South Tryon Street
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Charlotte, NC 28202
(704) 372-9000

Counsel for Respondent

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

TO: THE HONORABLE SUPREME COURT OF THE UNITED STATES.

Respondent City of Fayetteville, North Carolina, ("City") respectfully submits the following Brief in Opposition to Petitioners' Petition for Writ of *Certiorari* ("Petition"), which was filed with this Court on November 14, 2005.

STATEMENT OF THE CASE

Petitioners challenged a City annexation after the limitations period expired. They argued the federal Servicemembers Civil Relief Act, Pub. Law 108-189 of 2003 ("Relief Act"), had tolled the limitations period, but the trial court found the Relief Act inapplicable and dismissed Petitioners' challenge as time-barred. The North Carolina Court of Appeals upheld the dismissal, and the City's annexation became effective on September 30, 2005.

In North Carolina, municipalities may annex by adopting annexation ordinances that satisfy statutory standards. *See* N.C. Gen. Stat. § 160A-29 *et seq.* (2004). Owners of annexed property may petition a court to review an annexation they believe violates those standards. *See* N.C. Gen. Stat. § 160A-50(a) (2004).[1] (This Brief will call such petitions for review "annexation challenges.") If a challenged annexation violates statutory requirements, the reviewing court may void it or remand it to the municipality

---

[1] The City's annexation is governed by statutes that apply to municipalities of 5,000 or more persons. *See* N.C. Gen. Stat. § 160A-45 *et seq.* (2004). Separate, but analogous, statutes govern annexations by smaller municipalities. *See* N.C. Gen. Stat. § 160A-33 *et seq.* (2004).

for correction. *See* N.C. Gen. Stat. § 160A-50(g) (2004). However, petitions seeking judicial review must be filed "[w]ithin 60 days following the passage of an annexation ordinance[.]" N.C. Gen. Stat. § 160A-50(a) (2004).

The City adopted the challenged annexation ordinance on November 24, 2003, giving it a June 30, 2004 effective date. Petitioners did not challenge the annexation within 60 days after its November 24th adoption. Instead, they filed this challenge in the Superior Court of Cumberland County, North Carolina, 203 days after the annexation's adoption, on June 14, 2004. To argue their challenge was nonetheless timely, Petitioners invoked the Relief Act, a federal statute providing various benefits and protections to military servicemembers. They relied solely upon Section 206 of the Relief Act, a tolling provision:

> The period of a servicemember's military service may not be included in computing any period limited by law ... for the bringing of any action or proceeding ... by or against the servicemember[.]

Sec. 206, Pub. Law 108-189 of 2003; 50 U.S.C. App. § 526(a) (2005). Petitioners alleged they were military servicemembers and argued Section 206 had tolled their 60-day period for challenging the annexation. The City moved to dismiss Petitioners' challenge on the grounds that it was untimely.

Rejecting Petitioners' argument, the Cumberland County Superior Court ruled Congress never intended Section 206 to toll claims seeking to invalidate annexations or other large-scale government action. It also ruled applying Section 206 to annexation challenges would be unconstitutional. The Superior Court therefore dismissed this action as time-barred on June 28, 2004. (App. pp. 36a-

41a). Petitioners appealed to the North Carolina Court of Appeals, which affirmed unanimously on June 7, 2005. The Court of Appeals concurred that Congress had not intended Section 206 to toll claims seeking to void annexations. (App. pp. 1a-9a).

Petitioners petitioned the North Carolina Supreme Court to review the Court of Appeals' decision, but the Supreme Court announced it would not review the case on August 19, 2005.[2] (App. pp. 17a-18a). Under North Carolina law, the annexation's June 30, 2004 effective date was delayed while this action was pending. When the state Supreme Court declined to hear this matter, however, the effective date automatically became September 30, 2005. *See* N.C. Gen. Stat. § 160A-50(i) (2004) (effective date becomes last day of next full month following state courts' final disposition of annexation challenge). On September 12, 2005, Petitioners petitioned the North Carolina Supreme Court to stay the annexation while they petitioned this Court for *certiorari*, but it denied their request on September 13, 2005. (App. pp. 12a-14a). Petitioners then petitioned this Court to stay the annexation on September 27, 2005, but this Court also denied their request. (App. pp. 10a-11a).

The City's annexation therefore became effective on September 30, 2005, and the 28-square-mile annexation area has been part of the City since that date. City police now patrol the area, City firefighters respond to calls there, and City employees collect its residents' trash. The City also is rezoning the annexed area, and it has begun issuing building permits and other permits there. Finally, the annexation took effect before the City's November 8, 2005 election, in which residents selected a mayor and council

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[2] Because the Court of Appeals' decision was unanimous, the state Supreme Court had discretion whether to review the case. *See* N.C. Gen. Stat. § 7A-30 (2004) and N.C. Gen. Stat. § 7A-31 (2004).

members. Consequently, 23,000 registered voters in the annexed area were eligible to vote in the City's election.

SUMMARY OF THE ARGUMENT

Petitioners seek review of a question that has never arisen outside of this case. The North Carolina Court of Appeals is the only court, from any jurisdiction, ever to have considered whether the Relief Act tolls claims seeking to invalidate annexations or other large-scale government action. Although the Relief Act and its predecessors have existed for decades and apply nationwide, this specific question regarding the statute's applicability has never before arisen. Consequently, *certiorari* is unwarranted, as the decision below does not conflict with the decisions of this Court or of any other court, nor does it present an urgent question of federal law.

Although this case involves an issue of first impression, the decision below also rests squarely upon this Court's precedents. This Court has established the plain statement rule, which bars interpreting a federal statute to intrude upon state sovereignty absent an unmistakably clear congressional intent to intrude. The plain statement rule applies here, as Petitioners' argument would transform the Relief Act's tolling into a formidable obstacle for state and local government activities.

North Carolina (undoubtedly like many other states) allows citizens to challenge the validity of large-scale government operations. Citizens may file claims seeking to invalidate annexations, various financing initiatives, election results, and other government actions. Applying the Relief Act to toll such claims would devastate these necessary government operations because the Relief Act tolls indefinitely. It tolls a servicemember's claim for his or her entire military service, whether the tolling lasts for days or

decades. As a result, long after a statute of limitations expires, a single servicemember could file a suit seeking to invalidate a long-standing annexation, bond issue, municipal election, or other government action. The Relief Act would cast a pall of indefinite uncertainty over many government activities, frustrating state and local governments' ability to plan, budget, and carry out their operations.

Because the Relief Act would so interfere with state and local governance, the plain statement rule will permit Petitioners' reading of the statute only if they demonstrate an unmistakably clear indication Congress intended this interference. No such indication exists. Nothing in the Relief Act's language or legislative history suggests Congress intended the statute to indefinitely toll claims seeking to invalidate large-scale government actions like annexations. In fact, a Senate report published while Congress considered the statute even declared that, beyond two tax-related provisions not relevant here, the Relief Act "would have no impact on state, local or tribal governments." S. Rep. No. 108-197, at 13 (2003). Congress never intended the Relief Act to disrupt government operations as Petitioners claim. The North Carolina Court of Appeals properly interpreted the statute, and its decision should stand.

Finally, even had Congress intended the Relief Act to toll claims seeking to invalidate annexations, the statute would be unconstitutional as so applied. This Court has long recognized that municipalities are agents of state government and, consequently, that controlling municipal borders is a matter of state political discretion. Relying upon this Court's guidance on this issue, lower courts have correctly held that annexation (unless it implicates suspect classifications or fundamental rights) is a state issue lying beyond the reach of federal law. Petitioners' view of the

Relief Act would frustrate North Carolina's sovereign authority over annexation, rendering the Relief Act unconstitutional as applied.

The decision below did not create a conflict among lower courts, nor did it implicate an urgent issue of federal law. The North Carolina Court of Appeals also followed this Court's precedents and properly interpreted the Relief Act. The Petition should be denied.

THE PETITION FOR WRIT OF *CERTIORARI* SHOULD BE DENIED.

I. *CERTIORARI* IS NOT NEEDED TO RESOLVE A CONFLICT AMONG LOWER COURTS OR TO ADDRESS AN URGENT QUESTION OF FEDERAL LAW.

Petitioners' Petition disregards United States Supreme Court Rule 10, which describes generally when this Court grants *certiorari*. The City respectfully submits that, under Rule 10, *certiorari* would be warranted only if: (i) the decision below conflicted with a decision of this Court or of another court or (ii) the decision below involved "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Neither of these criteria is met here.

First, the decision below did not conflict with the decisions of this Court or of any other court. Below, the North Carolina Court of Appeals held the Relief Act does not toll claims seeking to invalidate annexations or other large-scale government action. The City has never found any decision of this Court or of any other court holding otherwise. Even Petitioners concede that they "have found no authority in any jurisdiction addressing the specific question presented here[.]" Petition, p. 27. No other court appears to have ever considered the issue. Consequently,

the decision below did not conflict with this Court's precedents, nor does it form part of a larger conflict among lower courts.

The Court of Appeals' decision below also failed to concern "an important question of federal law" demanding this Court's attention. Sup. Ct. R. 10(c). Again, this case appears to be the first considering whether Section 206 of the Relief Act tolls claims seeking to invalidate annexations or other large-scale government action. No other federal or state court decision, from any jurisdiction, could be found considering the issue. This question has never arisen before, despite the Relief Act's nationwide applicability and decades-long history. (Although the Relief Act was adopted in 2003, it amended the Soldiers and Sailors Civil Relief Act, a statute with an analogous tolling provision that had existed since World War II. *See* 50 U.S.C. App. § 525 (2002)). Because this question has arisen only once during the Relief Act's long history, and because Petitioners offer no reason to believe it will continue arising with any greater frequency, it is not urgent or pressing enough to warrant *certiorari*.

II. THIS MATTER IS NOW MOOT.

Petitioners' Petition is also moot because they cannot obtain the relief they seek. The City's annexation became effective on September 30, 2005, and North Carolina courts lack authority to invalidate annexations after they take effect. Therefore, even if this Court reversed the decision below and remanded this matter for North Carolina's courts to review the annexation's validity, those courts could not void the annexation even if they found it invalid.

Under North Carolina's constitution, the state legislature has exclusive (but delegable) authority to control municipal borders. *See* N.C. Const. Art. VII, Sec. 1. Through the annexation statutes, the legislature has partially

delegated its authority to expand municipal boundaries. However, it retains exclusive authority to remove territory from a municipality.

Specifically, N.C. Gen. Stat. § 160A-50 authorizes state courts to review challenged annexations, and N.C. Gen. Stat. § 160A-50(g) authorizes them to invalidate annexations that violate statutory requirements. However, under this statutory scheme, state courts may invalidate annexations only before they become effective. An annexation cannot become effective until at least 70 days after its adoption, while any challenges must be filed within 60 days after its adoption. *See* N.C. Gen. Stat. § 160A-49(e)(4) (2004); N.C. Gen. Stat. § 160A-50(a) (2004). Further, if a challenge is filed, the annexation's effective date is delayed until the reviewing courts have resolved the challenge. *See* N.C. Gen. Stat. § 160A-50(i) (2004). Therefore, the statutes contemplate reviewing courts invalidating only pending annexation ordinances, not annexation ordinances that have taken effect. The state legislature retains exclusive power to reverse a completed annexation.

North Carolina's Supreme Court has recognized that state courts lack authority to reverse completed annexations. *See Gaskill v. Costlow*, 270 N.C. 686, 155 S.E.2d 148 (1967). In *Gaskill*, the state Supreme Court held that an attempted annexation challenge was invalid partially because the annexation already had taken effect. The challengers therefore could not obtain a court ruling invalidating the annexation. Rather, their remedy was limited to compelling the annexing city to extend its municipal services to the annexed area:

> Having been completed without being challenged in the manner prescribed by statute, the annexation is an accomplished fact; and the remedies of property owners

> and citizens within the annexed areas are those provided in G.S. 160-453.5(h).

Gaskill, 155 S.E.2d at 151. The statute cited, N.C. Gen. Stat. § 160-453.5(h), permitted property owners only to compel an annexing municipality to extend municipal services to an annexed area. Because the annexation was complete, this was the only remedy available.[3]

If Petitioners prevailed before this Court, they would obtain only a remand so that North Carolina's courts could review the City's annexation under N.C. Gen. Stat. §160A-50. Reviewing courts, however, would have no authority under North Carolina law to grant the relief Petitioners ultimately seek, invalidation of the now-effective annexation. Because Petitioners no longer could obtain that relief, this matter has become moot.

III. THE COURT BELOW SOUNDLY INTERPRETED THE RELIEF ACT BY RELYING UPON THIS COURT'S PRECEDENTS.

Certiorari is also unwarranted because the decision below was sound. The North Carolina Court of Appeals obeyed this Court's precedents and properly interpreted the Relief Act.

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[3] After *Gaskill* was decided, the annexation statutes were amended and re-codified into Article 4A of Chapter 160A of the North Carolina Code. *See* N.C. Gen. Stat. § 160A-29 *et seq.* (2004). These current annexation statutes still grant reviewing courts no authority to invalidate completed annexations.

A. The Plain Statement Rule Governs Because Petitioners' Position Would Frustrate North Carolina's Sovereign Choices for Structuring Its Government.

1. The plain statement rule applies.

Below, the North Carolina Court of Appeals held Congress never intended Section 206 of the Relief Act to toll claims seeking to invalidate annexations.[4] To reach this conclusion, the Court invoked the plain statement rule (also called the "clear statement rule"), which prohibits interpreting a federal statute to intrude upon state sovereignty absent a "plain statement" showing an "unmistakably clear" congressional intent to intrude. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). This Court has recognized the plain statement rule applies if a federal statute threatens to frustrate a state's control over its municipalities. *See Nixon v. Missouri Mun. League*, 541 U.S. 125, 124 S. Ct. 1555, 1565 (2004) (plain statement rule applied because federal statute threatened to "interpos[e] federal authority between a State and its municipal subdivisions"). Petitioners analogously seek to use the Relief Act to disrupt North Carolina's control of its municipal agents' borders, making the plain statement rule applicable.

2. North Carolina's annexation process reflects the state's sovereign choices for structuring its government.

Petitioners' reading of Section 206 invokes the plain statement rule because it would disrupt North Carolina's annexation laws, frustrating that state's sovereign choices

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[4] Petitioners mischaracterized the decision below by claiming the North Carolina Court of Appeals held that N.C. Gen. Stat. § 160A-50(a) "outweighs" Section 206 of the Relief Act. *See* Petition, p. 26. In reality, however, the Court of Appeals simply held Congress never intended the Relief Act to apply to this type of matter.

about how to organize its government. Annexations, while undertaken by municipalities, ultimately are an exercise of the state's sovereign power. North Carolina's Constitution vests the state legislature with the exclusive (but delegable) power to regulate municipal borders. *See* N.C. Const. Art. VII, Sec. 1. Regulating municipal boundaries is an element of state sovereignty because municipalities are state agents, assisting the state by governing and serving the territory within their respective borders. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (Municipalities are "convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them."); *see also Smith v. City of Winston-Salem*, 247 N.C. 349, 354, 100 S.E.2d 835, 838 (1957); *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951). Selecting the territory its municipal agents will govern is part of how a state structures its government. The Relief Act would frustrate North Carolina's process for defining its municipal agents' territories.

North Carolina has chosen to structure its annexation process by allowing municipalities to annex independently. They may adopt self-executing annexation ordinances without obtaining specific permission for each annexation from the state legislature. *See* N.C. Gen. Stat. § 160A-29 *et seq.* (2004). This system provides many benefits, including freeing the legislature from micromanaging municipal boundaries and entrusting annexation decisions to local officials more familiar with the areas in question. Monitoring of annexations occurs through the judicial review provisions, which allow property owners to challenge a suspect annexation in court. *See* N.C. Gen. Stat. § 160A-50(a) (2004).

Finality is critical to North Carolina's annexation process. Annexing requires substantial commitment, as a municipality must extend services to the annexed area. *See*

N.C. Gen. Stat. § 160A-47(3) (2004). Extending services requires budgeting, extensive planning, incurrence of cost (and perhaps debt), and a reallocation of critical resources. Police stations and fire houses must be built, sewer and water lines must be laid, additional personnel must be hired, and other preparations must be made. The municipality must bind itself contractually with surveyors, engineers, and others who will perform this work. These preparations also must occur quickly, as annexing municipalities that fail to extend their services by specific deadlines are penalized. *See* N.C. Gen. Stat. § 160A-49(h) (2004); N.C. Gen. Stat. § 160A-49(k) (2004); N.C. Gen. Stat. § 160A-49(l) (2004). Because an annexing municipality must commit to its new residents, and commit quickly, it must quickly obtain certainty in its annexation's validity.

North Carolina law provides this certainty by limiting when annexations may be challenged. Courts lack jurisdiction to hear challenges filed more than 60 days after an annexation ordinance's adoption. *See* N.C. Gen. Stat. § 160A-50(a) (2004); *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 493 S.E.2d 797, 799, 800-01 (1997).[5] Because individual annexations are not blessed by the legislature, this 60-day limitations period provides a municipality's only certainty in its annexation's validity. Once that period expires, a municipality can commit its limited resources to serving the annexed area, and it can budget in reliance upon the additional revenue the annexed

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[5] The *Chicora* case did not involve the limitations period in N.C. Gen. Stat. §160A-50(a), but instead the analogous limitations period for challenging annexations of municipalities with fewer than 5,000 persons. *See* N.C. Gen. Stat. § 160A-38(a). Further, when *Chicora* was decided, the limitations period under both N.C. Gen. Stat. § 160A-38(a) and N.C. Gen. Stat. § 160A-50(a) was 30 days rather than the current 60 days.

area will produce.[6] If challenges were not barred after the 60-day period, annexation would become prohibitively perilous. A municipality could not devote limited resources to an annexation if a single person could invalidate it at some unknown future time.

3. Petitioners' reading of the Relief Act would cripple North Carolina's annexation process.

Petitioners' reading of Section 206 would disrupt North Carolina's annexation process by tolling the 60-day period indefinitely. Section 206 tolls a servicemember's claim for his entire term of service, regardless of whether he is overseas or stateside, and regardless of whether his service actually hinders pursuing the claim. *See Conroy v. Aniskoff*, 507 U.S. 511, 514-18 (1993); *Mason v. Texaco, Inc.*, 862 F.2d 242, 244-45 (10th Cir. 1988); *Bickford v. United States*, 656 F.2d 636, 639-41 (Ct. Cl. 1981); *Ricard v. Birch*, 529 F.2d 214, 217 (4th Cir. 1975).[7] Under Section 206, tolling could last years, or perhaps decades for a career servicemember.

Consequently, if Section 206 applied to annexation challenges, a municipality could never obtain confidence in an annexation. Instead, annexations would remain vulnerable to servicemember challenges indefinitely. Even after the 60-day period, even after the annexation's effective

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[6] An annexation's effective date can be scheduled no earlier than seventy (70) days after its adoption, ensuring all challenges must be filed before the effective date. *See* N.C. Gen. Stat. § 160A-49(e)(4) (2004). Further, the annexation's effective date is delayed during any challenge. *See* N.C. Gen. Stat. § 160A-50(i) (2004). Once an annexation takes effect, therefore, state law does not contemplate any further possibility of challenge.

[7] These cases were decided under the analogous tolling provision in the Relief Act's predecessor, the Soldiers and Sailors Civil Relief Act, 50 U.S.C. App. § 525 (2002).

date, a single servicemember could invoke the Relief Act and challenge the annexation. If he succeeded, the municipality's borders would shrink to pre-annexation levels. The municipality would permanently lose resources committed to the annexed area, such as water mains, sewer lines, and police and fire stations. It might also find itself carrying significant excess costs, as personnel and equipment devoted to policing the annexed area, collecting its trash, and extinguishing its fires would suddenly become superfluous. Additionally, the municipality could find its budget in shambles, as tax receipts and other revenue derived from the annexed area would be lost. A host of other problems and questions also would arise, including the validity of permits or citations the municipality had issued in the annexed area before the annexation was nullified.[8] Even if a particular annexation was never challenged, municipal officials would have to plan and govern while never knowing if the annexation was truly final.

Facing such uncertainty, many municipalities would not annex at all, preventing residents of potential annexation areas from receiving municipal services and frustrating state policies concerning when annexation should occur. Other municipalities might annex but be slow or stingy in committing resources to annexed areas. Ultimately, North Carolina could even be forced to change its annexation laws to accommodate the Relief Act's disruption, perhaps by eliminating the judicial review provision or by requiring all annexations to be adopted by the state legislature. Regardless, the state's chosen

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[8] Residents of the formerly annexed area, meanwhile, would suddenly find themselves under new management, by a county government perhaps unprepared to govern and serve them.

annexation process would cease functioning as the legislature intended.[9]

Petitioners argue the Relief Act would not disrupt North Carolina annexations because servicemembers' annexation challenges could still be barred by laches. *See* Petition, p. 22. However, in North Carolina, "what delay will constitute laches depends upon the facts and circumstances of each case." *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 581 S.E.2d 415, 424 (N.C. 2003). The applicability of laches depends upon the unique facts and circumstances surrounding each claim and each claimant. Consequently, municipalities would never know how much time would be needed for laches to begin protecting their annexations against challenges. Laches would therefore not reduce the uncertainty the Relief Act would create.

Because applying Section 206 to annexation challenges would frustrate North Carolina's sovereign choices for structuring its government, the plain statement rule applies. Petitioners can prevail only by showing an "unmistakably clear" congressional intent for Section 206 to toll claims seeking to invalidate annexations. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). They cannot carry this heavy burden.

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[9] The potential harm is not just prospective. The Relief Act amended the Soldiers' and Sailors' Civil Relief Act, which had existed since World War II and which contained a substantially similar tolling provision. *See* 50 U.S.C. App. § 525 (2002). If the Relief Act's tolling provision is held to apply to annexation challenges, already completed annexations throughout North Carolina could suddenly be vulnerable to servicemembers' challenges.

B. Petitioners Cannot Carry Their Burden Under the Plain Statement Rule.

Petitioners cannot demonstrate Congress intended Section 206 to toll claims seeking to invalidate annexations or other large-scale government action. In reality, Congress intended the statute to toll only claims seeking a personal recovery.

1. Annexation challenges differ fundamentally from the types of claims Congress intended the Relief Act to toll.

Annexation challenges differ fundamentally from the claims Congress intended the Relief Act to toll, because annexation challenges do not exist to vindicate a challenger's personal rights or interests. Rather, they are a mechanism North Carolina uses to monitor the activities of its political subdivisions.

The Relief Act focuses upon protecting servicemembers' personal financial interests, a fact evident from examining its various provisions. For example, Section 201 of the statute limits creditors' ability to obtain default judgments against servicemembers. Section 207 lowers interest rates on servicemembers' indebtedness. Section 301 restricts evictions of servicemembers. Other sections affect termination of motor vehicle leases, protect servicemembers' rights under life insurance policies, and limit foreclosures against their property. *See* Sec. 305; Secs. 541-549; Sec. 303. These provisions focus upon protecting servicemembers' personal financial concerns. Even Petitioners concede the Relief Act focuses upon servicemembers' "personal civil legal affairs." *See* Petition, p. 26. Similarly, when Congress adopted the tolling provision of Section 206, its purpose was to toll claims seeking to vindicate a servicemember's personal financial interests.

Annexation challenges, by comparison, do not exist to vindicate a challenger's personal rights or interests. In fact, how an annexation might affect the challenger's personal financial concerns is irrelevant and not considered by the reviewing court. *See In re Annexation Ordinance*, 278 N.C. 641, 648, 180 S.E.2d 851, 856 (1971). Instead, a challenger may attack an annexation only by arguing it fails to satisfy statutory requirements that focus upon the annexation as a whole, rather than upon how it affects challengers or their particular properties. *See* N.C. Gen. Stat. § 160A-50(f) (2004). Finally, a successful challenger obtains no personal recovery. The reviewing court simply invalidates the annexation or remands it to the municipality for correction. *See* N.C. Gen. Stat. § 160A-50(g) (2004). Thus, annexation challenges do not exist to vindicate a challenger's personal rights or interests. Rather, they exist to ensure annexations obey legislative directives and to protect state policies concerning when and how annexation should occur. Annexation challenges therefore differ fundamentally from the personal claims the Relief Act was intended to toll.

Because annexation challenges exist to help the state monitor the annexation activity of its political subdivisions, rather than to vindicate personal rights or interests, Petitioners' cases are inapplicable to this matter. The cases they cite involving tolling under the Relief Act's predecessor statute concerned the tolling of personal financial claims, not of claims seeking to invalidate large-scale government action. For example, Petitioners cite *Conroy v. Aniskoff*, 507 U.S. 511 (1993), where a servicemember sued to redeem property a town had seized to pay his delinquent taxes. *See* Petition, p. 11-13. This Court held the Relief Act's predecessor had tolled the limitations period on the servicemember's redemption claim. While that claim was directed against a municipality, however, it sought only to recover property belonging to the servicemember. It was

simply a personal claim that sought to remedy an injury to the servicemember's personal financial interests.

Similarly inapplicable is *Jinks v. Richland County*, 538 U.S. 456 (2003), where this Court held 28 U.S.C. § 1367(d) tolled the limitations period for a wrongful death claim against a county. *See* Petition, p. 20-21. Petitioners emphasize this Court held in *Jinks* that an "unmistakably clear" statement is not needed "before an Act of Congress may expose a local government to liability[.]" *Jinks*, 538 U.S. at 466-67 (emphasis added). However, annexation challenges do not expose municipalities to liability the way wrongful death or property redemption claims do. They do not remedy an "injury" the annexing municipality has committed against the challenger, but are instead a mechanism North Carolina uses to ensure annexations proceed in accordance with the state legislature's wishes. Tolling such challenges would therefore not merely prolong a municipality's exposure to a financial claim. It would directly interfere with a system North Carolina uses to regulate its municipal subdivisions. We cannot presume Congress intended to inject the Relief Act between a state and its political subdivisions in this way absent the unmistakably clear statement required by *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

Finally, annexation challenges also differ from the personal claims the Relief Act was intended to toll because tolling annexation challenges would have an effect vastly disproportionate to tolling other types of claims. When applied to claims seeking a personal recovery, Section 206 has a modest scope. For example, if a servicemember is injured in tort, usually only the tortfeasor must compensate for any tolling, and usually only by preserving evidence to defend the eventual claim. If Section 206 tolled claims seeking to invalidate entire annexations, however, a single servicemember could suddenly void an annexation that had

stood for years, profoundly affecting thousands of local residents and the city and county involved. No other Relief Act provision grants such sweeping power to individual servicemembers, and nothing suggests Congress intended Section 206 to grant such sweeping power, either.

2. The Relief Act would significantly disrupt many government activities.

Indefinitely tolling the time for challenging annexations would wreak havoc on North Carolina's annexation process. Additionally, however, Petitioners' reading of Section 206 would frustrate other government activities by indefinitely tolling claims seeking to invalidate them.

For instance, if a person believes a city's or county's bond issue violated statutory procedures, they may file a challenge only within thirty (30) days after the bond order is published. *See* N.C. Gen. Stat. § 159-59 (2004). Failure to act within that time bars any challenge. *See id.* Petitioners, however, argue the Relief Act tolls "any" limitations period, even those for claims challenging large-scale government action. Under their interpretation, therefore, a servicemember could challenge a bond issue's validity months or years after its completion. Political subdivisions would face the prospect that, at some unknown future time, they might need to redeem long-ago-issued bonds, without warning and when sufficient funds might be unavailable. Issuing bonds would become substantially riskier.

North Carolina statutes also provide a 30-day window to challenge the results of property tax referenda. *See* N.C. Gen. Stat. § 153A-149(d) (2004); N.C. Gen. Stat. § 160A-209(e) (2004). Petitioners' position would allow the Relief Act to toll that limitations period indefinitely, again making government financing perilous. A servicemember

could invalidate a property tax referendum long after the taxes were collected and spent.

(Belated annexation challenges, of course, could themselves detonate municipal finances. Annual budgeting, as well as long-term financing measures like bond issues, would depend upon a tax base that could shrink dramatically, and with little warning, if a long-final annexation were suddenly invalidated by a servicemember.)

Petitioners' position also would undermine elections, as individuals have a limited time to challenge election results. *See* N.C. Gen. Stat. § 163-182.9 *et seq.*[10] (2004); N.C. Gen. Stat. § 1-522 (2004). Understandably, the window for challenging election results is short, to prevent lingering uncertainty from impeding elected officials' ability to govern. *See id.* Petitioners' view of the Relief Act, however, would stretch that window indefinitely. Consequently, elections would never be definitive or final. Even months or years after taking office, elected officials might govern while fearing a servicemember could attempt to unseat them at any time. Additionally, the Relief Act would indefinitely extend the time for challenging absentee ballot validity or a person's right to vote, further muddling election results. *See* N.C. Gen. Stat. § 163-89 (2004); N.C. Gen. Stat. § 163-85 (2004).

These are just some examples of the havoc Petitioners' erroneous interpretation of the Relief Act would create. Others exist (e.g., the statute would indefinitely extend the time for challenging the creation of county water and sewer districts, for challenging the creation of hospital

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10 Election challenges under this statute are filed with a county board rather than with a court. However, Section 206 of the Relief Act tolls the time to file claims with any "board, bureau, commission, or department." Under Appellants' erroneous view of the Relief Act, therefore, tolling still would apply.

districts, or for challenging official action taken in violation of open meetings laws. *See* N.C. Gen. Stat. § 162A-87(b) (2004); N.C. Gen. Stat. § 131E-43 (2004); N.C. Gen. Stat. § 143-318.16A (2004)). The above examples also concern only North Carolina. The Relief Act would undoubtedly also disrupt government operations in the other 49 states.

It is difficult to imagine Congress adopting such a disruptive statute. Even if it did, however, we must presume it would not have embarked upon such an endeavor lightly. Congress first would have studied the implications, weighing the benefits that tolling would provide to servicemembers against the inevitable disruption it would cause state and local governments. Congress also would have considered the constitutional issues necessarily invoked by the prospect of a federal statute so thoroughly intruding upon state government. Nothing suggests Congress considered any of these issues when adopting the Relief Act, revealing it never intended the statute to apply as Petitioners urge.

3. The Relief Act's legislative history defeats Petitioners' reading.

The Relief Act's legislative history further rejects Petitioners' interpretation of Section 206. During Congress's consideration of the Relief Act, the Senate Committee on Veterans' Affairs issued a 76-page report on the statute's intended effects. *See* S. Rep. No. 108-197 (2003).[11] This report identified only two provisions affecting State or local governments, both concerning income taxing of servicemembers (Section 206 was not one of them). The

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[11] The text of the Senate bill reported upon (S. 1136) was later substituted for the text of House Bill H.R. 100. The amended H.R. 100 was then adopted by Congress and became the Relief Act. *See, eg.*, 149 Cong. Rec. D1316-02 (2003 WL 22852557); 149 Cong. Rec. H. 12868; 149 Cong. Rec. H. 12928.

report declared the Relief Act's remaining provisions "would have no impact on state, local or tribal governments." *Id.* at 13 (emphasis added). This legislative history defies Petitioners' claim that Congress intended Section 206 to affect annexations or other large-scale government operations.

4. Petitioners rely upon only a single, isolated word, which fails to satisfy the plain statement rule.

To support their reading of the Relief Act, Petitioners can only emphasize that Section 206 tolls "any" period limited by law. Section 206, Pub. Law 108-189 of 2003. This single, isolated word, however, fails to satisfy the plain statement rule, as this Court recognized just last year in *Nixon v. Missouri Mun. League*, 541 U.S. 125, 124 S. Ct. 1555, 1565 (2004). In *Nixon*, Missouri had adopted a statute barring its municipalities from the telecommunications business. However, the federal Telecommunications Act prohibited states from excluding "any entity" from that business. Missouri municipalities argued they qualified as "any entity" and that the Telecommunications Act therefore pre-empted Missouri's attempt to bar them from providing telecommunications services. Despite the Telecommunications Act's broad "any entity" language, however, this Court found no "plain statement" that Congress intended the Telecommunications Act to affect Missouri's control over its municipal subdivisions, and it rejected the municipalities' claim. *See Nixon*, 124 S. Ct. at 1565.

Similarly, the word "any" in Section 206 of the Relief Act, read in isolation, fails to demonstrate Congress intended the awesome intrusion into state sovereignty Petitioners seek. While "any" makes this provision broad, its breadth reflects only that the personal claims Congress intended to toll are many and varied (negligence actions,

breach of contract, worker's compensation, intentional torts, enforcing liens, quiet title, wages claims, etc.). The word "any" alone fails to demonstrate an "unmistakably clear" congressional intent for Section 206 to disrupt State and local government operations on a large scale. *See Nixon*, 124 S. Ct. at 1561 (" 'any' can and does mean different things depending upon the setting.")

5. Conclusion.

The decision below was sound. The Court of Appeals obeyed this Court's precedents by applying the plain statement rule to determine if Congress truly intended the intrusion upon state sovereignty that Petitioners urge. After examining the Relief Act's language, legislative history, and purpose, the Court of Appeals properly concluded Congress never intended the statute to affect state annexations. The decision below should stand, and *certiorari* is unwarranted.

IV. PETITIONERS' READING WOULD RENDER THE RELIEF ACT UNCONSTITUTIONAL AS APPLIED.

Finally, even were the Relief Act intended to affect challenges to North Carolina annexations, the statute would be unconstitutional as applied. North Carolina is a sovereign entity in our federal system. It has constitutionally protected authority to structure and organize its government, authority with which Congress cannot freely interfere. *See, e.g., Coyle v. Smith*, 221 U.S. 559, 565 (1911) (Congress cannot choose state's capital because choosing government seat is "essentially and peculiarly" state's power). North Carolina's annexation laws help draw that state's internal political boundaries. They are an exercise of the state's power to arrange its government, and the Relief Act cannot constitutionally frustrate those laws' operation.

This Court has specifically held a state's authority over its governmental structure includes the ability to organize its municipal subdivisions without federal interference. In *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907), Pennsylvania residents challenged a state statute that permitted larger municipalities to absorb smaller ones. This Court rejected a claim that the Pennsylvania statute was unconstitutional, recognizing that a state's ability to arrange and control its municipalities lies beyond the reach of federal law:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. ... The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. ... The State, therefore, at its pleasure may modify or withdraw all such powers ... expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. ... In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907) (emphasis added). *Hunter*'s recognition of broad state control over municipal subdivisions has been limited only by this Court's recognition that federal law can intervene to ensure state political structures do not deny individuals

their constitutional rights. For example, under Section 5 of the federal Voting Rights Act, some municipalities' annexations must be precleared by the federal government to ensure they will not result in voting discrimination. *See* 42 U.S.C. § 1973c (2005). This Court has recognized that the Voting Rights Act's ability to intrude upon state government structure in this way rests upon Congress's Fifteenth Amendment power to protect individual voting rights. *See Lopez v. Monterey County*, 525 U.S. 266, 269 (1999). But, unless municipal structure threatens individuals' constitutional rights, *Hunter* continues to instruct that control of municipal boundaries is a state political question not subject to federal law. For example, the Fourth Circuit recently relied upon *Hunter* in rejecting a constitutional challenge to North Carolina's annexation laws. *See Barefoot v. City of Wilmington*, 306 F.3d 113, 123 (4th Cir. 2002) (citing *Hunter*) (unless voting rights or suspect classifications implicated, "annexation decisions are within the absolute discretion of the State"), *cert. denied*, 537 U.S. 1019 (2002).

If the Relief Act applied as Petitioners' urge, it would violate *Hunter*'s recognition that states have broad political discretion over how their municipal agents are organized. Further, unlike the Voting Rights Act, the Relief Act would not reflect an attempt by Congress, acting under the Civil War Amendments, to remedy violations of individuals' constitutional rights. Instead, if Petitioners' reading were correct, the statute would be an attempt by Congress to control state political structures while using its Article I powers to promote federal policy choices. Petitioners cite no authority supporting the idea that Congress's Article I powers allow it to override state control over municipal boundaries in this manner.

To argue that the Relief Act can constitutionally disrupt North Carolina's annexation process, Petitioners cite *United States v. Onslow County*, 728 F.2d 628 (4th Cir. 1984).

There, because a large military base was located in Onslow County, North Carolina, many children of non-resident servicemembers attended County schools. The County charged those servicemembers a fee to fund their children's education. However, the Relief Act's predecessor barred states from imposing income taxes on non-resident servicemembers, and the Fourth Circuit struck the County's fee because it effectively was an income tax. The Fourth Circuit rejected the County's argument that, in barring the fee, the Relief Act's predecessor unduly infringed upon state sovereignty. Rather, the court found that the statute was a necessary and proper exercise of Congress's war powers.

However, the injury the Relief Act would cause state sovereignty in this case differs substantially from the limited impact its predecessor had in *Onslow County*. In *Onslow County*, the Relief Act's predecessor imposed upon the County only a limited financial burden. It did not directly override North Carolina's choices for how its government should be structured. Further, the statute also imposed a financial burden only upon a few North Carolina localities (those with high servicemember populations), and the Fourth Circuit concluded that state sovereignty was not violated partially because of this limited impact. "[H]ere the federal legislation burdens only those few localities in any state which are home to large federal military installations." *Onslow County*, 728 F.2d at 639. By comparison, even a single servicemember may challenge an annexation in North Carolina. *See* N.C. Gen. Stat. § 160A-50(a) (2004). If applied to toll annexation challenges, therefore, the Relief Act would affect every North Carolina municipality, not just those near military installations.

Petitioners also argue that *Onslow County* held the Tenth Amendment is a "rule of construction" imposing no substantive external limits on congressional war powers. *See* Petition, p. 24-25. Even if viewed as a rule of

construction, however, the Tenth Amendment still must guide how we interpret the Constitution. It confirms that "powers not delegated to the United States ... are reserved to the States[.]" Therefore, it is insufficient for Petitioners simply to argue the Tenth Amendment imposes no substantive external limits Congress's delegated powers. They also must demonstrate that the Constitution actually delegates to Congress, as part of Congress's war powers, the power to override state control over municipal boundaries. Otherwise, as the Tenth Amendment confirms, that power is reserved to the states. "The Tenth Amendment thus directs us to determine ... whether an incident of state sovereignty is protected by a limitation on an Article I power." *New York v. United States*, 505 U.S. 144, 157 (1992).

Petitioners offer nothing to suggest our Constitution's Framers, when creating congressional war powers, divested the states of their traditional power to arrange their political subdivisions and delegated that power to the national government. None of the cases cited in their Petition involved federal war powers legislation attempting to modify a state's internal political boundaries. Even *Onslow County* is inconsistent with a claim that war powers can be used to restructure state political subdivisions, as there the Fourth Circuit recognized that "[t]he matters with which the War Powers deal are national in character[.]" *Onslow County*, 728 F.2d at 641. Finally, the idea that war powers legislation can override a state's control over its municipal agents' boundaries directly contradicts *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907), wherein this Court declared that state control over municipal borders is "unrestrained by any provision of the Constitution[.]"

Petitioners' reading of the Relief Act would allow that statute to frustrate North Carolina's sovereign power to choose the territories of its municipal agents, exceeding the

scope of Congress's Article I war powers. In addition to finding no support in the Relief Act's text, history, or purpose, Petitioners' interpretation would render that statute unconstitutional as applied.

CONCLUSION

Certiorari is unwarranted. Reviewing this case is not necessary to settle any conflict brewing among lower courts or to address an urgent question of federal law. Further, the decision below adopts a sound interpretation of the Relief Act, while Petitioners' erroneous interpretation would render the statute unconstitutional as applied. The Petition should be denied.

Dated: December 14, 2005 /s/

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